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The Legal Church-State Relationships in the United States

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WITH SPECIAL REFERENCE
TO THE PUBLIC SCHOOLS

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PREFACE

THE PRIMARY purpose of this study has been to ascertain the legal status of certain church-state relationships in America, especially as those relationships affect our public elementary and secondary schools. The work is divided into three sections: Part I, a consideration of Bible reading, prayer, and the singing of hymns in connection with religious exercises in the public schools; Part II, a consideration of other sectarian influences as they affect the public schools; and Part III, a consideration of state activity in the field of religion as reflected in Sunday legislation. In this last section special attention has been given to such topics as Sunday Laws, Sunday Amusements, Sunday Laws and the Police Power, Exemptions for Seventh-Day Observers, Opposition to Sunday Laws, and One Day of Rest in Seven.

The materials consist primarily of the state constitutions, statutes, and court decisions. In selecting court decisions and opinions I have chosen to use primarily only Supreme Court cases, state and federal. Some states have no statute bearing directly on the subject of Bible reading and no court decisions. Other states, however, have statutes that may require, or permit, or prohibit such reading, as well as court decisions interpreting such statutes.

A questionnaire was sent to the state departments of education requesting information concerning the present practice in regard to Bible reading in the public schools. My thanks are due the officials of the several state departments of education for their unanimous response to this questionnaire and for other information which they generously supplied.

I am also greatly indebted to a number of persons who encouraged me to undertake this study and who have rendered valuable assistance in its preparation. The impetus was

received several years ago while I was studying in the University of Michigan under the direction of the late Professor Claude H. Van Tyne. The work was unavoidably interrupted for some time and in some of its aspects somewhat modified. To Dr. Oliver P. Field, professor of political science and constitutional law in the University of Minnesota, who has read the entire manuscript and has offered numerous and valuable criticisms as the work progressed, the author is indebted more than he can adequately express in any formal acknowledgment; to him belongs much of the credit for what is meritorious, without any responsibility for its shortcomings. Valuable suggestions were also received from Dr. William Anderson, professor of political science, from Dr. J. S. Young, professor of political science, and from Dr. George M. Stephenson, associate professor of history, all of the University of Minnesota. The author assumes full responsibility, however, for such misstatements of fact or errors of judgment as the work may contain.

The material on Sunday legislation has appeared, with some slight modifications, in the writer's articles in the *Kentucky Law Journal*.

A. W. J.

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PART I
BIBLE READING IN THE PUBLIC SCHOOLS

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CHAPTER I

THE DEVELOPMENT OF BIBLE READING IN THE PUBLIC SCHOOLS

ONE OF the principles upon which the government of the United States is founded is the separation of church and state. The proper attitude of the state toward religion has, however, remained a subject of controversy, one that has been revived today by an insistent demand for religious teaching in the public schools. That religious instruction would involve a union of religion with the state is admitted, but that it would be a violation of the American principle is denied on the ground that no union of church and state would be established. The subject is not only attracting a great deal of attention throughout the United States, but it is of vital concern to individuals, school boards, teachers and administrators, legislators, and courts.

In considering this subject we must remember that what developed into our public school system had its beginnings largely in Puritan New England. With the superconscientious Puritans religious questions had an important place in governmental affairs and in education; with them the primary business of a school, as of any intellectual enterprise, was religion. A review of their history and literature, particularly that of the seventeenth and early eighteenth centuries, reveals that church affairs, moral beliefs, and religious conduct were proudly woven into the entire fabric of government. They were a people forever conscious of the imminence of impending doom and of the responsibility of every man for his neighbor's fate. Their attitude toward education, like that of most of the other American colonists, was similar to that prevailing in England and in the

continental countries. Education was considered to be the responsibility and function not of the state but of the family and the church. In England school teachers were required to hold a license from the bishop or other church authorities. Dissenters from the English church were not permitted to participate in educational work. It was generally accepted that the people were born to obey and not to rule. Our early colonies, save Rhode Island, were a long time in breaking away from the old theory of the union of church and state and much longer in actually relinquishing the traditions associated with that union.

In Virginia the parish institutions transported from England were the earliest educational agencies.¹ Although much of the teaching took place in the home and with the aid of tutors, every minister had a school, and it was the duty of the vestry to see that all the poor children were taught to read and write. County courts supervised the vestries, and every year there was held what was known as an "orphans' court" for the purpose of providing for the educational and material needs of all orphans.

In the field of secondary education an early attempt was made in Virginia to establish a Latin grammar school. Here again European traditions were accepted and followed. At the beginning of the seventeenth century the Latin grammar school of one kind or another was commonly the institution in which children were taught in the principal countries of Europe. These schools had grown out of the monastic and cathedral schools of the Middle Ages. They had been enriched greatly by the literary influence of the Renaissance,

¹ James Truslow Adams says, "The early Virginia settlers were, at first, indeed, as solicitous as the New Englanders about education, but the results of the geographic environment were felt as strongly in this as in the other matters on which we have already touched. With the bad roads and the scattered life of the plantations, it was impossible for the common school to take root as it did in the compact little villages of New England. But if the common schooling was somewhat less diffused, the culture of the educated class was wider, and the private libraries of the Virginians offer to the booklover a refreshing contrast to the dead weight of theology on the New England shelves." *The Founding of New England* (Boston, 1927), 1:369.

which encouraged the study of the humanities. It was natural that colonies should imitate these countries, especially England, by establishing similar schools in America. In the Virginia colony a plan was developed for the establishment of such a school, to be known as the "East Indy School."² It was to be located in Charles City, was to be a free school, and was to serve as a preparatory school for the college Virginia hoped soon to establish. Funds were collected for its endowment, and land was set apart for its use. But the Indian massacre of 1622, in which more than three hundred of the colonists lost their lives, took place before the school was actually established, and this was followed by the fall of the Virginia Company in 1624. The project seems to have been abandoned; at any rate, there is no evidence that the school was ever opened.

In New England, where Calvinism was at its height, the attempt of the Massachusetts Bay colony to establish a free school was more successful. The Boston Latin School established in 1635 was the outcome of the Boston town meeting held on the twenty-third of April, in which it was voted "that our brother Philemon Pormont, shall be entreated to become scholemaster, for the teaching and nourtering of children with us."³ The first record we have of a provision for the support of this school is an action of a meeting held on August 12, 1636.⁴ This act is frequently referred to by writers as the progenitor of our public school system, inasmuch as the town was undertaking the education of its children. Charles Austin Beard, in his *Rise of American Civilization*, questions this position, however, on the ground that the primary schools at the bottom of the system of formal education were inspired, as were the colleges, by the reli-

² The first benefactor of the East Indy School was the Reverend Patrick Copeland, who had spent a number of years in India, and the school was named in his honor.

³ Quoted by John Franklin Brown, *The American High School* (New York, 1910), p. 7.

⁴ Elmer Ellsworth Brown, *The Making of Our Middle Schools* (New York, 1914), p. 35.

gious motive. He says, "The idea of elementary schools supported by taxation, freed from clerical control and offering instruction to children of all classes, found no expression in colonial America. Indeed it was foreign to the experience of the Greeks, Romans, and Europeans of the Middle Ages, whose psychology still dominated the West."⁵

The Latin grammar school of Boston served as a preparatory school for Harvard College. Harvard, the "School of the Prophets,"⁶ was established in 1636, six years after the settlement of Boston, when the general court voted the sum of four hundred pounds toward the erection of a "public school or college." Half of this amount was to be paid the following year and the balance when the work was completed. Twelve of the principal magistrates and ministers were chosen to "take orders for a college at Newtown." A year later the name was changed to Cambridge, after Cambridge, England.

In September of 1638 the school received its first and most important gift upon the death of John Harvard, a clergyman of Charlestown, who had resided in the country only a year. He bequeathed his entire library and one-half of his property, worth seven hundred pounds. The college at once took the name of its principal benefactor.⁷

Other Massachusetts towns followed the example set by Boston in establishing a grammar school, and within a few years several such schools had been established, though there was great variation in regard to rules and the conditions of establishment.

The second college to be founded in America was William and Mary in Virginia, chartered by the crown in 1693. As Harvard opened under Puritan auspices, so the latter was launched under Anglican control. Yale, the third college to be founded, was a Puritan institution chartered by the legis-

⁵ Beard, *The Rise of American Civilization* (New York, 1927), 1:177.

⁶ The school was variously referred to as a "seminary," as a "college," and as the "School of the Prophets."

⁷ John Stetson Barry, *History of Massachusetts* (Boston, 1855), 1:310-13.

lature of Connecticut to fit the youth "for publick employment both in Church and Civil State." The five other colleges established before the middle of the eighteenth century were also organized under religious leadership. Princeton was Presbyterian; King's College (now Columbia University) was Anglican; Brown was Baptist; Rutgers was Dutch Reformed; and Dartmouth College, which originated in Moor's Indian Charity School, though not established by any one denomination, was missionary in purpose, having for its ostensible object the education and conversion of the Indians.

That the religious impulse was the chief motive in establishing elementary schools as well as secondary schools and colleges is evident from the language of the legislative acts and articles establishing such institutions. In 1647 Massachusetts passed what has now become her famous law requiring the establishment of an elementary school in every town containing fifty families and a grammar school wherever there were one hundred families.⁸ The law reads:

It being one cheife piect of yt ould deluder, Satan, to keep men from the knowledge of ye Scriptures, as in formr times by keeping ym in an unknowne tongue, so in these lattr times by pswading from ye use of tongues, yt so at least ye true sence & meaning of ye originall might be clouded by false glosses of saint seeming deceivers, yt learning may not be buried in ye grave of or fathrs in ye church & comonwealth, the Lord assisting or endeavors, —

It is therefore ordred, yt evry towneship in this iurisdiction, aftr ye Lord hath increased ym to ye number of 50 householdrs, shall then forthwth appoint one within their towne to teach all such children as such resort to him to write and reade, whose wages shall be paid eithr by ye parents or mastrs of such children, or by ye inhabitants in generll, by way of supply, as ye maior pt of those yt ordr ye prudentials of ye towne shall ap-

⁸ By an act of 1642 Massachusetts charged the selectmen in all of her towns to see that parents and masters provided for the education of their children. They were to teach them *to read and to understand the principles of religion*, the laws of the land, and to engage in some suitable employment.

point; pvided, those yt send their children by not oppressed by paying much more yn they can have ym taught for in othr townes; & it is furthr ordered, yt where any towne shall increase to ye numbr of 100 families or householdr, they shall set up a gramer schoole, ye mr thereof being able to instruct youth so farr as they may be fited for ye university, pvided, y if any towne neglect ye pformance hereof above one yeare, yt every such towne shall pay 5 £ to ye next schole till they shall pforme this order.⁹

This law, which really established a school system, is noteworthy in that it is distinctly civil in character. From the days of the Roman Empire, in which education had been considered a civil function, to the time when Massachusetts passed this famous law, education in the western world had been in the hands of the church and church orders, the only exceptions being a few occasional and scattered projects under civil authority. The control of education was now gradually to come back to the civil power, but with a vigorous survival of church atmosphere and ecclesiastical intrusion.

One would expect to find in Massachusetts and other New England colonies, as well as in Anglican colonies such as Virginia, where the church and state were one, that religion would play an important part in the establishment of schools. Especially among the Puritans, as is revealed by the Massachusetts law, was religion bound up with education. The function of the school was primarily to train theologians and only incidentally men to direct affairs of state. Frequently the church was put first, or church and state were considered one. In connection with "The Free Schoole in Roxburie" we read:

Whereas, the Inhabitants of Roxburie, in consideration of their religeous care of posteritie, have taken into consideration how necessarie the education of theire children in Literature will be to fitt them for public service, both in Churches and Commonwealthes, in succeeding ages . . .¹⁰

⁹ Brown, *The American High School*, p. 8.

¹⁰ Brown, *The Making of Our Middle Schools*, p. 40.

The rules that governed the New Haven Grammar School, conforming to the "Orders of ye Committee," included the following requirements:

That the Schollars being called together the Mr shall every morning begin his work with a short Prayer for a blessing on his labours & theire Learning.

That ye Schollars behave themselves at all tymes, especially in Schoole tyme with due Reverence to theire Master, & with Sobriety & quietness among themselvs, without fighting, Quarreling or calling one anothr or any others, bad names, or using bad words in Cursing, takeing the name of God in vaine, or other prophane, obscene, or Corrupt speeches which if any doe, that ye Mr Forthwith give them due Correction . . .

That if any of ye Schoole Boyes be observed to play, sleep, or behave themselves rudely, or irreverently, or be any way disorderly att meeting on ye Saboath Dayes or any other tymes of ye Publique worships of God That upon informacion or Complaint thereof to ye due Conviccion of the offender or offenders, the Master shall give them the Correccion to ye degree of ye Offence. And yt all Correccions be wth Moderacion.

That all the Lattin Schollars, & all other of ye Boyes of Competent age and Capacity give the Mr an accompt of one passage or sentence at least of ye sermons the foregoing Saboth on ye 2d day morning. And that from 1 to 3 in ye afternoons of every last day of ye week be Improved by ye Mr in Catechizing of his Schollars yt are Capeable.¹¹

Among the requirements of the grammar school connected with William and Mary College was this one:

Let the Master take special Care, that if the Author is never so well approved on other Accounts, he teach no such Part of him to his Scholars, as insinuates any Thing against Religion or good Morals.¹²

In the selection of teachers just as much attention was given to their piety and religious standing as to their scholarship, perhaps more. As Professor Reisner points out, the

¹¹ *American Journal of Education*, 4:710.

¹² Quoted by Brown in *The Making of Our Middle Schools*, p. 130.

town schools established by the Massachusetts Bay colony were schools of the Puritan religion. No one could vote who was not a church member. Affairs of the church and affairs of civil government were directed by the same group of persons. "The pastors of the churches were the supervisors of the schools and the main materials of instruction were the Bible and the tenets of the Calvinistic religion."¹³

Educational policies similar to those of Massachusetts were adopted by New Hampshire. Inasmuch as New Hampshire was a part of Massachusetts when the law of 1647, to which we have already referred, was adopted, the law applied also to New Hampshire. Penalties were attached for the failure of the selectmen of the towns to maintain or establish such schools in conformity with the Massachusetts act.

The Connecticut code of 1650 was virtually a verbatim copy of the Massachusetts act establishing a system of schools in that colony. Many of these laws were still in force at the time of the Revolution. In both New York and Maryland education was fostered under the patronage of royal governors, largely under the Episcopal plan.

The patroons and colonists of New Netherlands were required by an order issued by the West India Company in 1629 to "endeavor to find out ways and means whereby they may supply a minister and school master." Following this call an elementary school was established in 1633 in connection with the church at New Amsterdam. This school, which is still in existence as a preparatory school for boys, probably has the distinction of being the oldest school in America. Other elementary schools were established, and some rather unsuccessful attempts were made to establish Latin grammar schools. The New York Latin grammar school, established by Catholic Jesuits, came to an end with the close of the reign of King James II and the administration of the Roman Catholic governor in 1688. No other

¹³ Edward H. Reisner, *The Evolution of the Common School* (New York, 1930), pp. 44, 45.

Roman Catholic schools appear to have been established in New York until after the conclusion of the Revolutionary War.

The "Frame of Government" which Penn drew up for the colony he established upon the tract granted him in 1681 by Charles II provided for freedom of religion, except for "Papists." Large powers were granted to an elective legislature, and provision was made for a system of education under civil control. The governor and the provincial council were given orders to erect and order all public schools, and to encourage and reward authors of "useful sciences and laudable inventions in the said province." The first legislature of Pennsylvania, meeting in 1682, passed a statute directing that the laws of the province be taught in the schools of the province. The second legislature, which met on March 10, 1683, passed an act requiring parents and guardians to have their children taught reading and writing and "some useful trade or skill, that the poor may work to live, and the rich, if they become poor, may not want."

Thus in Pennsylvania, as to some extent in Maryland and Rhode Island, the provincial government took advanced steps in the matter of public control of education. With the close of the seventeenth century we find in Maryland, Pennsylvania, and especially in Rhode Island, what was virtually an experiment in religious liberty. Much of this ground was lost, however, in the early years of the eighteenth century. In Penn's final Frame of Government (1701) the earlier provisions for education were omitted, and public instruction was left to the several religious denominations in the colony. In Maryland five years earlier an act of 1696 proposed a system of education that was a mixture of civil, ecclesiastical, and private endeavor.

Puritanism, or Congregationalism, in its various phases was established in Massachusetts and Connecticut, and the Church of England was officially recognized in Virginia and the Carolinas. In the other colonies ecclesiastical functions

were more or less confused, no definite policy or organization being in control.

Upon the accession of William and Mary, the Church of England developed greater interest in the American colonies, entering upon extensive missionary operations. This Anglican influence was soon felt in the colonies and had an important bearing on educational movements. Notable Episcopal gains were made even in Puritan New England. While the first concern of the Society for the Propagation of the Gospel in Foreign Parts, the official extension agent for the Church of England, was to establish Anglican ministers in colonial parishes, their second concern was the establishment of schools, which were largely of the elementary grades. They not only established the elementary school of Trinity Church in New York, which still exists, but gave substantial support to King's College (now Columbia University), established in 1754, which was the second Episcopal college in the colonies.

The effort to extend Episcopalianism produced incidentally a bitter feeling on the part of sectarian groups, which by the middle of the eighteenth century had developed into heated controversy. While the leaders of the day were working for church unity, the existing differences became more evident; unintentionally the demands for religious freedom were strengthened, and the desire for a complete separation of church and state, which found expression in certain statements in the Declaration of Independence, increased. This movement toward separation went on slowly during the eighteenth century. Along with it developed that "positive civic and secular spirit" which was so evident during the Revolutionary period. Channing puts it thus:

Before the Revolutionary epoch, religion had been closely connected with the government except in those colonies where the Quakers had impressed their ideas upon legislation. Even in them, the policy of the English government had made it necessary for many officers to take oaths or subscribe tests that were

contrary to the scruples of Roman Catholics and Jews. Everywhere dissent was growing and toleration increasing.¹⁴

As the idea of religious equality was taking shape, America came to be looked upon as a land in which the oppressed might find shelter under a government that welcomed all to its shores. Among the immigrants were the Presbyterians from northern Ireland, who began coming in 1718, and a similar group from Scotland. Public education was greatly emphasized by these people, and, believing as they did in an educated ministry, they laid great emphasis upon a college education. Their experience with the Anglican church system of Ireland and the established Presbyterianism of Scotland impelled them to oppose state-controlled church establishments in this country. Their influence was readily felt throughout the middle and southern colonies in their efforts to effect the separation of church and state and to remove from the domain of the churches education furnished by the states. The European Baptists and the Huguenots, who settled in the Carolinas, also promoted the secularization of education fostered by the civil powers.

When we study the Revolutionary era of constitution making, we find that only the constitutions of Massachusetts and Connecticut required a system of universal public education that was recognized as an important element in civil life. Pennsylvania required that provision be made "to instruct youth at low prices." According to Bancroft, seven of the state constitutions established some sort of religious test as a qualification for civil office:

Maryland and Massachusetts required "belief in the Christian religion"; South Carolina and Georgia, in "the Protestant religion, and the divine authority of the Old and of the New Testament"; Pennsylvania, "a belief in God, the creator and governor of the good and punisher of the wicked," with a further acknowledging "the scriptures of the Old and New Testament to be given by divine inspiration"; Delaware, a profession of "faith in

¹⁴ Edward Channing, *History of the United States*, 8:560-61 (New York, 1918).

God the Father, Jesus Christ his only Son, and the Holy Ghost, one God, blessed for evermore."

These restrictions were but incidental reminiscences of ancient usages and dearly cherished creeds, not vital elements of the constitutions; and they were opposed to the bent of the American mind.¹⁵

For more than two centuries the humbler Protestant sects had sent up the cry to heaven for freedom to worship God. To the panting for this freedom half the American states owed their existence, and all but one or two their increase in free population. The immense majority of the inhabitants of the thirteen colonies were Protestant dissenters; and, from end to end of their continent, from the rivers of Maine and the hills of New Hampshire to the mountain valleys of Tennessee and the borders of Georgia, one voice called to the other, that there should be no connection of the church with the state, no establishment of any one form of religion by the civil power; that "all men have a natural and unalienable right to worship God according to the dictates of their own consciences and understandings." With this great idea the colonies had travailed for a century and a half; and now, not as revolutionary, not as destructive, but simply as giving utterance to the thought of the nation, the states stood up in succession, in the presence of one another and before God and the world, to bear their witness in favor of restoring independence to conscience and the mind.¹⁶

Several of the states did not enfranchise the Catholics or Jews. The Catholics were permitted to hold office in Rhode Island, New York, New Jersey, Virginia, Massachusetts, Pennsylvania, Delaware, Maryland, and, with some restriction, in Connecticut. The Jews might hold office only in Rhode Island, New York, New Jersey, and Virginia.

In some states—Maryland, for example—the legislature might at its discretion lay a general tax for the support of the Christian religion. Massachusetts required "the support of public Protestant teachers of piety, religion, and morality." In Massachusetts and in Connecticut the Puritan worship was

¹⁵ George Bancroft, *History of the United States*, 5:121 (New York, 1888).

¹⁶ *Ibid.*, p. 119.

still closely connected with the state. South Carolina, in her attempt to preserve the union of church and state, went so far in her legislation on religion as to declare the "Christian Protestant religion" to be the established religion of the state.

But a new day was approaching, a day when constitutional provisions and legislative acts designating an established religion gradually came to have no meaning. The struggle in the Virginia legislature which resulted in the disestablishment of the Anglican church and the civil equality of every denomination in that state is a well-known story. The work of the Presbyterians, Baptists, Quakers, and others under the leadership of such men as Madison and Jefferson brought to Virginia not religious toleration but religious liberty.

These principles found expression in the Declaration of Independence as penned by Thomas Jefferson:

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . .

The principle of separation of church and state carried over into the field of education. The same spirit that had manifested itself in opposition to state control or support of religion likewise bred opposition to state support of sectarian schools. If education was to be religious it must be carried on by the churches and without the support of the state. With the demand for an educational system supported by the state came a similar demand that such an education be nonsectarian.

As we have seen, the Latin grammar school emphasized the religious training because it prepared men for the two learned professions of the time—the law and the ministry; Latin, Greek, Hebrew, and the study of the Scriptures held a large place in its curriculum. Now, however, there arose a

popular clamor for a different kind of school—a school in which theological discussions would be given less room, a school that would emphasize less its preparatory training for the college and be more a finishing school emphasizing the ideals of general culture and a practical preparation for life—in short, a school of the people. This demand gave birth to the academies.

The first American academy to be established was the Public Academy in the city of Philadelphia, founded by Benjamin Franklin in 1751, which later grew into the University of Pennsylvania. The organization of this school was largely the result of agitation carried on by Franklin and his friends, in the course of which he printed and distributed *Proposals Relating to the Education of Youth in Pennsylvania*. It received its support partly from public subscription and partly from the government. The subscribers chose a board of twenty-four trustees, who organized and conducted the affairs of the school. The work of the school is set forth by Franklin in the following words:

As to their studies, it would be well if they could be taught everything that is useful, and everything that is ornamental. But art is long and their time is short. It is therefore proposed, that they learn those things that are likely to be most useful and most ornamental; regard being had to the several professions for which they are intended. All interested for divinity, should be taught the Latin and Greek; for physic, the Latin, Greek, and French; for law, the Latin and French; merchants, the French, German, and Spanish; and, though all should not be compelled to learn Latin, Greek, or the modern foreign languages, yet none that have an ardent desire to learn them should be refused; their English, arithmetic, and other studies absolutely necessary, being at the same time not neglected.¹⁷

Though the spirit of the academy was obviously religious, it was more liberal than that which had prevailed in the colonial schools and which still survived in the grammar

¹⁷ Jared Sparks, *Works of Franklin* (Philadelphia, 1840), 1:572, 574.

schools. Most of the activities were nonsectarian, though many academies were established and controlled by individual denominations. Their control was generally vested in a self-perpetuating body. They were dependent upon individual contributions and church grants, though frequently they were liberally endowed. Sometimes they received financial assistance from the state or city, as did the Philadelphia Academy, for instance, though control remained in the hands of the corporation. They endeavored to meet the needs of the people.

The academies were attended by more mature students than were the grammar schools and were open to both boys and girls. Though they were schools of the people, the fact that they were under private control and that they charged tuition fees made them more or less exclusive. In many cases they served as a beginning as well as a finishing school, though their training early took on the college preparatory aspect, exerting a liberalizing influence upon the colleges of the day.

In general it may be said that they were animated by a broader, freer, and more truly American spirit than that of the Latin grammar schools, a spirit more nearly in accord with the developing principles of American democracy. They wielded a powerful influence in American education through their training of teachers for the elementary schools. Thus, as has been said, they were in a sense the predecessors of our present normal schools.

Many of the academies were taken over by the city or town and supported by taxation, and thus they were really the precursors of the public high schools of a later date. Roughly speaking, the academy was the chief secondary school from the American Revolution to the Civil War, just as the grammar school had been the principal school up to the Revolution.

The first high school in the United States was founded in Boston. By 1818, Boston had extended its public school sys-

tem to include the elementary as well as the grammar schools. In 1821 the English Classical School was established as a free nonclassical school for the boys of Boston who might not be able to continue their education in an academy because of the expense connected with it. In general it may be said that the high school, which became the most important school after the Civil War, took the place of the academy. The grammar schools, as we have seen, did not meet the demand of the common people, for these schools looked to the college. Their course of study was designed to prepare students for positions in the state or in the church. The academy, while it offered a wider course of study and was practical in that it trained students for the practical needs of life, was controlled by a close corporation, and, being expensive, was open only to the few. In response to the new demand for equality of opportunity, and in harmony with the growing spirit of freedom and democracy, the American high school was set up—an institution which was to be free and under public control, which was to offer a practical as well as a cultural course of study, and which was to be open to all at public expense. Thus was established what was to become the connecting link between the public elementary schools and the colleges or, more particularly, the state universities.

The constitutional right of a community to levy taxes for the support of high schools was carried to the courts in 1872 in a suit brought by *Stuart et al. v. School District No. 1 of the Village of Kalamazoo, Michigan*,¹⁸ in which an attempt was made to prevent the collection of taxes voted for the support of the high school and for payment of the school superintendent's salary. The Supreme Court of the state said:

Neither in our state policy, in our constitution, or in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the

¹⁸ 30 Mich. 69.

grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose.¹⁹

Everyone is familiar with the phenomenal growth of the public high school since 1860, but the desire for a free, non-sectarian public school system began long before this. Great strides were taken in the thirties and forties of the nineteenth century, a period during which the doctrine of equal rights was being spread by the Jacksonian democracy. In the words of Beard, "For a nation of farmers and mechanics, bent on self-government and possessed of the ballot, there was only one kind of an educational program in keeping with self-respect, namely, a free and open public school system supported by taxation and nonsectarian in its control."²⁰

Organized labor now began to demand from the legislators the establishment of free common schools. With the development of our factories in the early nineteenth century, new social problems arose. Aroused by the unwholesome conditions and injustice that existed, the workers formed labor unions. The spokesmen of these labor interests frequently made demands for general public education. While changes came slowly, before the middle of the century many significant reforms sought by labor had been accomplished. "Laws for the protection of the life and health of the factory hands were enacted, imprisonment for debt disappeared, and the effort to establish schools supported by public taxes and controlled by the public will finally succeeded."²¹ Labor objected to charity education, demanding in its place a system of public education "not as charity but as the right of every child," an education that should be open and free to all.

John R. Commons, in his *History of Labor in the United States*, tells us that in 1830 education was the "paramount issue in the Working Men's party. 'All history,' it was said, 'corroborates the melancholy fact, that in proportion as the

¹⁹ 30 Mich. 69.

²⁰ Beard, *American Civilization*, 1:810.

²¹ Edgar Wallace Knight, *Education in the United States* (Boston, 1929), p. 179.

mass of the people becomes ignorant, misrule and anarchy ensue—their liberties are subverted, and tyrannic ambition has never failed to take advantage of their helpless condition. . . .”²² Thus more and more education came to be looked upon not only as a function of government but as a duty to its citizens, for an intelligent citizenry was considered indispensable to a successful democracy.

As the spirit of natural science wrought a transformation upon the minds of the intellectual classes, making for a secularization of social processes, so the multiplication of religious sects and their ceaseless rivalry tended to accelerate the movement for a more definite separation of church and state.

The increasing numbers of Irish and other immigrants from Europe, who, it was feared, were likely to fall under Catholic instruction if educated in charity schools, influenced Protestants to accept “secularism rather than papal authority.” Such secularization of schools made its greatest strides in the frontier states, where there were fewer vested sectarian interests. In the eastern states private academies and universities had made greater progress, with the result that property rights were involved to a greater extent.

Strife among the religious sects, brought about by the desire of each denomination to imbue all the pupils in its school with its theological beliefs, coupled with the spirit of the Jacksonian democracy and the demands of labor, strengthened the demand for general public schools free from clerical control and supported by general taxation. Secular instruction was the only kind of instruction on which all sects could agree.

The spirit of Jacksonian democracy was determined to destroy favoritism in education as well as privilege in politics. Thus the educational movement of the third, fourth, and fifth decades of the nineteenth century developed into a polit-

²² John R. Commons, *History of Labor in the United States* (New York, 1918), 1:227.

ical force that served as a great impetus to education in both the elementary and the secondary field. Appropriations were increased. Teachers' salaries were raised. Better school buildings, textbooks, and general equipment were sought. The school year was lengthened and state supervision was introduced. District, county, and state organizations were set up in turn. Technical schools were developed, and finally the Morrill Act of 1862, which served as the great stimulus to the promotion of mechanical and agricultural education, was enacted.

The completely secularized university was represented by the University of Virginia, established in 1825, and the University of Michigan, established in 1837. But more particularly the public elementary schools had become secularized. The tendency toward secularization in secondary education found expression in the public high school.

This movement for the secularization of public schools, which excluded avowed forms of religion from its exercises, was greatly strengthened by an opposition to what had been the practice in colonial days. This was demonstrated by the various state constitutional conventions as well as by the federal convention itself.²³ As we have seen, the movement was given impetus by the forces that ushered in the Jacksonian democracy, reaching its greatest height, perhaps, with the proposed federal constitutional amendment presented by James G. Blaine on December 14, 1875, which reads as follows:

No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by school taxation in any State, for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any

²³ Article 6 of the federal constitution reads: ". . . but no religious test shall ever be required as a qualification to any office or public trust under the United States." The first amendment as adopted states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

religious sect; nor shall any money so raised, or lands so devoted, be divided between religious sects or denominations.²⁴

The amendment passed the House by a vote of 180 to 7. In the Senate it received a vote of 28 for and 16 against, thus failing to receive the necessary two-thirds vote. In the same year, 1876, both the Republican and Democratic platforms included a declaration on the subject of religious freedom and public schools.

The same principle of religious freedom upon which was based the demand for a complete separation of church and state was applied to the public school system. It was demanded that all forms of religious practices be kept out of the public school system. In 1872 the Supreme Court of Ohio handed down by unanimous vote its famous decision in which it upheld the refusal of the Board of Education to permit the reading of the Bible in the public schools of Cincinnati, declaring:

Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.²⁵

President Grant enunciated this principle when he said, "Let us . . . leave the matter of religious teaching to the family altar, the church, and the private school, supported entirely by private contributions."²⁶

Since that time there have been various manifestations of a movement on the part of certain individuals and organiza-

²⁴ William Addison Blakely, *American State Papers Bearing on Sunday Legislation* (Washington, 1911), p. 349.

²⁵ Board of Education of Cincinnati v. Minor et al., 23 Ohio St. 211.

²⁶ Speech made to G. A. R. veterans at Des Moines, Iowa, in December, 1875, quoted in *The Catholic World*, 22:434, 435 (January, 1876).

tions not only to stem the tide of sentiment favoring complete separation but to reverse the movement and bring in a closer union of church and state. As some have confessed their aims, they would "capture the public schools" for Christianity. They have termed the public schools "godless" and would give Christ what they assert to be "His rightful place" in our public school system.

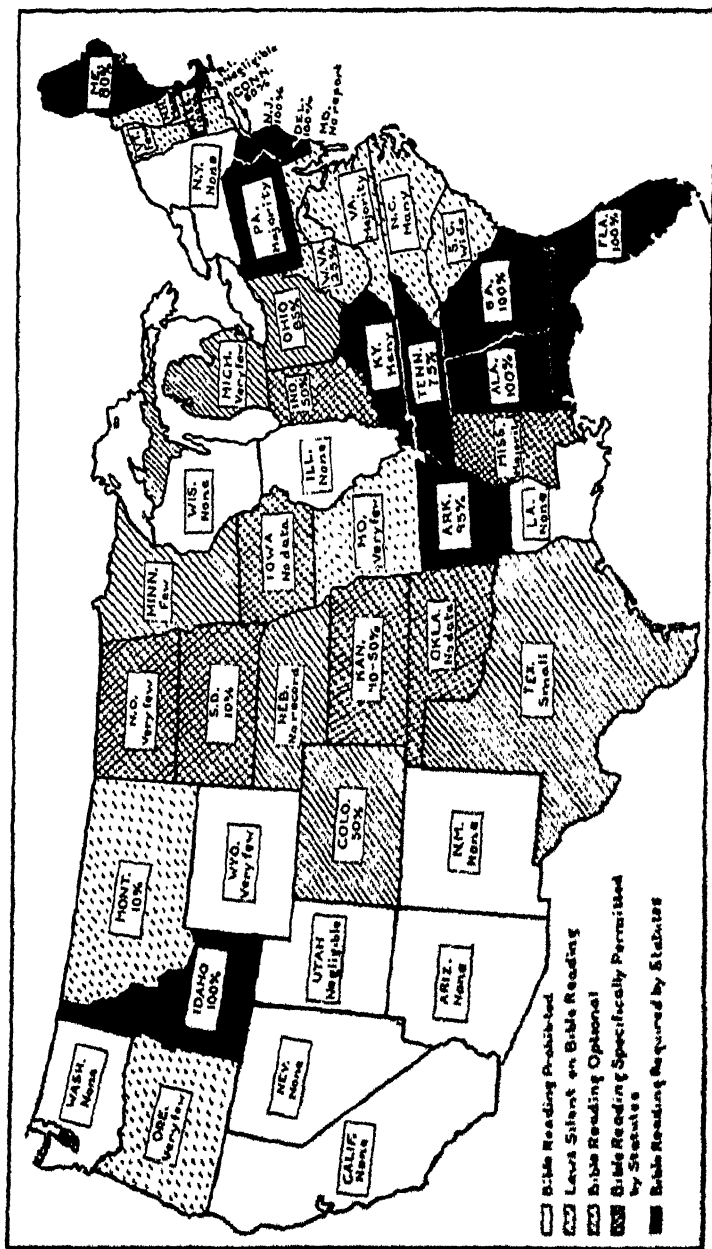
This spirit expressed itself also in renewed agitation for Sunday legislation throughout the states and in the petitions and bills for religious legislation and religious amendments to the constitution with which Congress was besieged. It accounts for the proposed "Religious Educational Amendment" introduced by Senator Blair on May 25, 1888. Section 2 reads:

Each state in this union shall establish and maintain a system of free public schools, adequate for the education of all the children therein, between the ages of six and sixteen years inclusive, in the common branches of knowledge, and in virtue, morality, and the principles of the Christian religion.

It appears that the purpose here was to establish the "Christian religion" throughout the public school system by teaching the "principles of the Christian religion." The proposed amendment died with the Fifty-first Congress. In the states this spirit is reasserting itself in a movement to make Bible reading in the public schools compulsory.

During the first fifty years of the nineteenth century only one state, namely, Massachusetts, enacted a statute requiring Bible reading in the public schools.²⁷ During the last fifty years of the century no such law was passed, nor in the opening decade of the twentieth century; but during the next ten years, 1910-20, the legislatures of five states enacted laws requiring Bible reading in the public schools: Pennsylvania in 1913, Delaware and Tennessee in 1915, New Jersey in 1916, and Alabama in 1919. During the decade 1920-30 six more states passed similar laws: Georgia in 1921, Maine in

²⁷ The Massachusetts statute was passed in 1826.



STATUS OF BIBLE READING IN THE PUBLIC SCHOOLS OF THE SEVERAL STATES

1923, Kentucky in 1924, Florida and Idaho in 1925, and Arkansas in 1930; and in 1926 the Board of Education of the District of Columbia passed a ruling requiring the Bible to be read daily in the public schools of the District.

This legislation has naturally brought before various state courts the question as to the constitutionality of Bible reading in the public schools. Several questions are involved: Does the reading of the Bible constitute sectarian instruction? Is the Bible a sectarian book? Does time spent in its reading or study by teachers constitute the appropriation of public funds for sectarian purposes? Is compulsory attendance during such reading a violation of the religious liberty granted in the state constitutions?

The first case involving these issues to come before an American court was tried in the state of Maine in 1854, and the next in Massachusetts in 1866. A similar case came before the state Supreme Court in Ohio in 1872, in Iowa in 1884, in Wisconsin in 1890, and in Michigan in 1898.²⁸

Thus prior to 1850 the courts were free from such litigation, and in each decade from 1850 to 1900 but one case was brought up for adjudication, with the exception of the period between 1880 and 1890, during which there were two. But in the first decade of the twentieth century no fewer than five cases were called before state Supreme Courts, in the second decade three, and in the third decade at least six.²⁹ During the past eighty years, therefore, more than a score of cases involving this controversial question have reached the highest state courts, approximately three-fourths

²⁸ *Donahoe v. Richards*, 38 Me. 376; *Spiller v. Inhabitants of Woburn*, 94 Mass. 127; *Board of Education of Cincinnati v. Minor et al.*, 23 Ohio St. 211; *Moore v. Monroe*, 64 Ia. 367; *Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967; *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560.

²⁹ *State v. Scheve*, 65 Nebr. 853, 91 N.W. 846 (1902); *Billard v. Board of Education*, 69 Kans. 53 (1904); *Hackett v. Brooksville Graded School District*, 120 Ky. 608, 87 S.W. 792 (1905); *Dorner v. School District No. 5*, 137 Wis. 147, 118 N.W. 353 (1908); *People v. Board of Education*, 245 Ill. 334 (1910); *Herold v. Parish Board of School Directors*, 136 La. 1034, 68 So. 116 (1915); *Knowlton v. Baumhover*, 182 Ia. 691 (1918); *State ex rel. Dearle v. Frazier*, 102 Wash. 369 (1918); *Wilkerson v. City of Rome*, 20 A.L.R. 1535, 152 Ga. 763 (1921); *Evans v. Selma Union High School District of Fresno County*, 222 Pac.

TABLE SHOWING STATUTES, DECISIONS, AND PRESENT PRACTICE

State	Statute requires Bible reading	Statute specifically permits Bible reading	Statute prohibits Bible reading	Court decision permits Bible reading	Court decision prohibits Bible reading	Statute has no provision for excusing pupils during Bible reading
Alabama.....	X (1919)					X
Arizona.....			X			
Arkansas.....	X (1930) ²					
California.....			X		(1924) ³	
Colorado.....				X (1927)		
Connecticut.....						
Delaware.....	X (1915)					X
Florida.....	X (1925)					X
Georgia.....	X (1921)			X (1921)		
Illinois.....	X (1925)		X ²⁰		X (1916)	
Indiana.....		X		X (1884, 1918)		
Iowa.....		X		X (1904)		
Kansas.....		X				
Kentucky.....	X (1924)			X (1905)		
Louisiana.....			X ²⁰		X (1915)	
Maine.....	X (1929)			X (1854)		X
Maryland.....						
Massachusetts.....	X (1826)			X (1866)		
Michigan.....				X (1898) ⁴		
Minnesota.....				X (1927)		
Mississippi.....		X ¹²				
Missouri.....						
Montana.....						
Nebraska.....					X (1903) ¹³	
Nevada.....		X				
New Hampshire.....						
New Jersey.....	X (1916)					
New Mexico.....		X				
New York.....		X ¹⁶				
North Carolina.....						
North Dakota.....		X ¹⁶				
Ohio.....				X (1872) ¹⁷		
Oklahoma.....		X				
Oregon.....						
Pennsylvania.....	X (1913)					X
Rhode Island.....						
South Carolina.....						
South Dakota.....		X		X (1929) ¹⁴		
Tennessee.....	X (1915)					
Texas.....				X (1908)		
Vermont.....			X			
Virginia.....						
Washington.....			X		X (1918, 1930) ¹⁵	
West Virginia.....			X ¹⁸			
Wisconsin.....			X ¹⁹		X (1890)	
Wyoming.....			X			

Prohibited by general wording of laws.
 In the general election of 1930 an initiative act proved by the voters required the Bible to be read daily, without comment, in the public schools of Arkansas.
 Decision permits Bible in public school library.
 No statute or court decision specifically mentions Bible reading in the public schools.
 Board of Education of District of Columbia requires Bible to be read daily.
 Law requires revocation of certificate of any teacher who fails to have the Bible read in conformance with the statutory requirement.
 The question involved here was whether the Bible could be used as a textbook, for classroom reading.

²Court held that the committee of the town might lawfully pass an order requiring schools to be opened each morning by reciting from the Bible and prayer, and that during the prayer each scholar should bow his head unless his parents requested that he be excused from doing so.
³Decision permits use of *Readings from the Bible*.
⁴Opinion rendered by attorney-general is adverse to Bible reading, though it is left optional with local school board or teacher.
⁵No statute specifically mentioning Bible reading, though the Supreme Court has upheld the practice. It is assumed that such reading is optional with the school board; apparently, however, the court questioned the advisability of such practice.

PERTAINING TO BIBLE READING IN THE PUBLIC SCHOOLS

[illegible]

¹²The Mississippi statute, though not specifically mentioning Bible reading, requires a suitable course of instruction in the "principles of morality and good manners," such course to "include what is known as the Mosaic Ten Commandments."

"The decision was not rendered on the constitutionality of Bible reading. The religious exercises as conducted constituted sectarian instruction. This decision is generally considered favorable to Bible reading, since it leaves the matter to the school authorities.

"Pupils may be excused from school session for a specified period each week for religious instruction elsewhere.

"Attorney-generals have ruled against Bible reading.

¹⁶Statute requires that Ten Commandments be exhibited in every schoolroom. The Bible is not a sectarian book, nor may it be excluded from any public school.

¹⁷This decision may be said to permit Bible reading in that it leaves it to the local school boards to determine what shall be taught. Aside from this, the principles enunciated are adverse to Bible reading in the public school.

¹⁵ While the decision is adverse to Bible reading, it permits the practice, but requires that pupils be permitted to absent themselves during such reading.

¹⁹Bible reading is considered contrary to constitutional and statutory provision.

¹⁰Supreme Court has interpreted constitutional and statutory provisions as prohibiting Bible reading.

of which have come up in the last thirty years. The largest number of cases to come before the courts during a single decade were tried during the ten-year period 1920-30. Finally, in the year 1931, one of these cases was appealed to the Supreme Court of the United States.³⁰ On these questions considerable controversy has been waged. The opinions in the different decisions vary considerably, and the question can by no means be said to have been settled.

Twelve states have statutes and the District of Columbia a ruling requiring Bible reading in the public schools. Seven states have statutes specifically permitting Bible reading. Eleven states have statutes prohibiting the reading of the Bible in the public schools;³¹ in five of these, cases have been carried to the state Supreme Court, which in every case has rendered a decision upholding the statutory prohibition.³² In twelve state Supreme Court cases,³³ decisions permitting Bible reading have been rendered. Some of these opinions—for example, that rendered in the South Dakota case,³⁴ may be said to be adverse to Bible reading; though it permits such reading, it requires that the teacher allow students to be excused from the room during such exercises.

Five of the twelve states having statutes requiring Bible reading make no provision for excusing pupils during the

801, 31 A. L. R. 1121 (1924); *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Kaplan v. Independent School District of Virginia*, 214 N. W. 18 (1927); *State ex rel. Finger v. Weedman et al.*, School District Board, 226 N. W. 348 (1929); *Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1940).

³⁰ This was an appeal in the case of *George I. Clithero et al. v. N. I. Showalter*, as State Superintendent, et al., No. 80 (1931).

³¹ The twelve states requiring Bible reading are Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Massachusetts, New Jersey, Pennsylvania, and Tennessee. The seven in which it is specifically permitted are Indiana, Iowa, Kansas, Mississippi, North Dakota, Oklahoma, and South Dakota. The eleven in which it is prohibited are Arizona, California, Illinois, Louisiana, Nevada, New Mexico, New York, Utah, Washington, Wisconsin, and Wyoming.

³² California, Illinois, Louisiana, Washington, and Wisconsin. In Nebraska and Ohio cases have been carried to the courts in which those courts rendered decisions adverse to Bible reading but left the question of Bible reading to the discretion of the school authorities.

³³ Colorado, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Ohio, South Dakota, and Texas.

³⁴ *State ex rel. Finger v. Weedman et al.*, 226 N. W. 348 (1929).

reading.³⁵ Of the states having statutes requiring or specifically permitting Bible reading, eight have statutory provisions excusing pupils during such reading. In four states the courts have held that pupils must be excused at their request or at the request of parents or guardians.³⁶ At least two states have statutory provisions permitting pupils to be excused for a certain period each week during the regular school session to receive religious instruction elsewhere, and at least five states allow credit toward high school graduation for Bible study.³⁷ Eleven states and the District of Columbia have statutory provisions prohibiting any comment on the reading of the Scriptures.³⁸

In three states the attorney-general has ruled against Bible reading; in a fourth he has rendered an opinion adverse to Bible reading, but has left such reading optional with the local school board or teacher.³⁹

Regarding current practice with respect to Bible reading the state departments of education have reported as follows:⁴⁰ twelve states and the District of Columbia reported that during the school year 1932-33 the reading of the Bible was required in their public schools, seven states reported that it was permitted, eighteen that it was optional, and eleven that it was prohibited. In answer to the question "In what percentage of the public schools in your state would you say that the Bible is daily read?" eight of those in which Bible reading was required—Alabama, Delaware, the District of Columbia, Florida, Georgia, Idaho, Massa-

³⁵ Alabama, Delaware, Florida, Maine, and Pennsylvania.

³⁶ The statutes of Georgia, Idaho, Iowa, Kansas, Kentucky, Massachusetts, North Dakota, and Tennessee require that pupils be excused. Colorado, Massachusetts, Minnesota, and South Dakota are the states in which the courts have handed down such a ruling.

³⁷ In New York and Oregon pupils may be excused for religious instruction elsewhere, and Indiana, Montana, North Dakota, Virginia, and West Virginia allow credit for Bible study.

³⁸ Arkansas, Florida, Idaho, Kansas, Kentucky, Maine, Massachusetts, New Jersey, North Dakota, Pennsylvania, and South Dakota.

³⁹ California, New York, Washington, and Michigan.

⁴⁰ These statistics are based on reports made on a questionnaire sent to state departments of education in October and November of 1932.

chusetts, and New Jersey—reported 100 per cent, “universal,” or “all”; Arkansas reported 95 per cent; Pennsylvania, “a majority”; Maine, 80 per cent; Tennessee, 75 per cent; and Kentucky, “a large number.”

In the twenty-five states in which Bible reading was “permitted” or “optional,” the number of schools having Bible reading was reported as follows: Ohio, 85 per cent; Colorado, 50 per cent; Kansas, 40–50 per cent; two states, Iowa and Oklahoma, “no data,” and Nebraska, “no record.” Six states—Michigan, Minnesota, Missouri, North Dakota, Oregon, and Vermont—reported “very few” or “very small”; Mississippi and Virginia, “a majority”; New Hampshire, “commonly read”; North Carolina, “a large number”; South Carolina, “widely read”; Connecticut, 50 per cent; Indiana, 50 per cent; West Virginia, 25 per cent; South Dakota, 10 per cent; Texas, “small”; Rhode Island, “negligible”; and Montana, “less than 10 per cent.” Maryland failed to answer this question.

The eleven states in which Bible reading is prohibited in the public schools replied to the question “In what percentage of the public schools in your state would you say that the Bible is daily read?” as follows: ten states—Arizona, California, Illinois, Louisiana, Nevada, New Mexico, New York, Utah, Washington, Wisconsin—reported “none,” and Wyoming “very few.”⁴¹

There is already an interesting array of material pertaining to statutory law and court decisions that bear on the subject of Bible reading in the public schools. While there is by no means unanimity of opinion, certain trends may be seen that bid fair to result in even greater interest in the subject in the near future. In the chapters that follow consideration will be given to constitutional provisions, statutes, and court decisions bearing on this subject.

⁴¹ See the map and chart on pages 24, 26, and 27 for tabulation of statutes, decisions, and present practice pertaining to Bible reading in the public schools. Also see the Appendix.

CHAPTER II

BIBLE READING AND THE FEDERAL GOVERNMENT

THE POWER to regulate Bible reading in the public schools does not appear among the list of powers delegated to the federal government by the constitution of the United States. The constitution provides only that "no religious test shall ever be required as a qualification to any office or public trust under the United States"¹ and that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."² The first amendment, which places this latter restriction upon religious legislation, cannot be invoked to protect the citizens of the respective states.³ The protection of the religious liberty of citizens is, therefore, left largely to the states.⁴ As Justice Story said, "it was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject."⁵

Whereas the first amendment forbids the federal government to establish religion or prohibit the free exercise thereof, the fourteenth amendment places within its province the power to protect the liberties of the individual against state

¹ Article 6, Clause 3.

² First amendment.

³ *Permoli v. Orleans*, 3 Howard, U. S. 589 (1845).

⁴ The right to worship according to the dictates of conscience was placed in the state constitutions, beyond the power of legislatures to restrain. Thomas M. Cooley, *Constitutional Limitations* (8th ed., Boston, 1927), p. 960; Joseph Bondy, *How Religious Liberty Was Written into the American Constitution* (Syracuse, New York, 1927).

⁵ Joseph Story, *Commentaries on the Constitution* (5th ed., 2 vols., Boston, 1891), Section 1879.

encroachment. It reads in part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."⁶ There has been considerable dispute as to whether these words confer upon the federal government jurisdiction with respect to religious liberty. The decisions rendered in earlier cases would seem to be contrary to such an interpretation. In 1898, however, the Supreme Court of the United States in defining the word "liberty" as used in the fourteenth amendment said in the case of *Allgeyer v. Louisiana*:⁷

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Again, in 1923, in the case of *Meyer v. Nebraska*⁸ the federal Supreme Court held that a state law forbidding the teaching in any private school of any modern language other than English to any child who has not passed the eighth grade invades the liberty guaranteed by the fourteenth amendment and exceeds the power of the states:

The problem for our determination is whether the statute . . . infringes the liberty guaranteed to the plaintiff . . . by the fourteenth amendment. "No state . . . shall deprive any person of life, liberty, or property, without due process of law."

While this court has not attempted to define with exactness the liberties thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage

⁶ Article 14, Section 1.

⁷ 165 U. S. Rep. 578 (1898).

⁸ 262 U. S. 390 (1923).

in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

In *Pierce et al. v. Society of Sisters*⁹ the Supreme Court of the United States held that the act of 1922 requiring parents to send their children between the ages of eight and sixteen years to the public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

On October 19, 1931, however, the Supreme Court of the United States refused to consider the challenged validity of the provision of the constitution of the state of Washington prohibiting Bible reading and instruction in the public schools. It dismissed, for want of a substantial federal question involved, the appeal in the case of *George I. Clithero et al. v. N. D. Showalter, as State Superintendent et al.*,¹⁰ in which it was claimed that the prohibition violated the rights guaranteed by the federal constitution and the Declaration of Independence.

The constitution of the state of Washington provides:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."¹¹

The Supreme Court of Washington construed the above provisions to forbid religious worship, exercise, or instruction

⁹ 268 U.S. 510 (1925).

¹⁰ 284 U.S. 573. For attempts to put "God" in the federal constitution see the editorial entitled "The Periodical Campaign to Put God in the Constitution" in the *Christian Century*, January 14, 1931. Efforts have been made to insert in the preamble, after the words "We, the people of the United States," the words "devoutly recognizing the authority and law of Jesus Christ, the Saviour and King of nations."

¹¹ Article 1, Section 11; Article 9, Section 4.

in the public school system and denied the petition of the appellants for a writ of mandamus to compel the State Board of Education to arrange the curriculum of the public schools to provide for Bible reading and instruction.

The case had been instituted in the Washington Supreme Court to compel the State Board of Education to make provision for daily Bible instruction in the public schools. The petition, which was filed with the board on September 9, 1930, by George I. Clithero and thirty-six others who are described in the record as "parents and school-age children of the state of Washington," demanded that the superintendent and the State Board of Education require the teaching and reading of the Bible in the public school system of that state. By this "teaching and reading of the Bible" was meant that the Bible must be read at least once on every school day in every common school, high school, and other school of the public school system, that instruction must also be given in the Holy Scriptures . . . on at least two school days each school week"¹² in all the schools, and that the said reading and teaching of the Bible was to be compulsory.

On September 26, 1930, the State Board of Education passed a motion that the petition be returned to Mr. Clithero on the grounds that it raised a constitutional question on which the board had no jurisdiction or authority. Thereupon the petitioners asked the Supreme Court of the state to issue a writ of mandamus requiring the board to change its action and to receive and grant the petition. The Supreme Court ruled that the questions presented by Mr. Clithero were answered in the case of *State ex rel. Dearle v. Frazier*,¹³ where a full discussion of the question was entered into and in which the state constitution of Washington was held to forbid everything that Mr. Clithero demanded.

¹² From Transcript of Record, Supreme Court of the United States, *State of Washington ex rel. George I. Clithero et al. v. N. D. Showalter, etc., et al.*, No. 80; 159 Wash. 519; 293 Pac. 1000 (1930).

¹³ 102 Wash. 369 (1918).

The appellants in their petition alleged that the aforementioned Article 1, Section 11, of the constitution of the state of Washington ("No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment"), as interpreted by the state Supreme Court to prohibit the reading and teaching of the Bible in the public schools and state educational institutions, is contrary to the Declaration of Independence and is a violation of the constitution of the United States, especially the preamble and the first and fourteenth amendments. They alleged further that this interpretation violated the fourth section of the Enabling Act admitting the four states of North and South Dakota, Montana, and Washington into the Union, as well as the inherent rights of the petitioners as individuals, citizens, parents, and school-age children. They contended that:

The several states and subdivisions thereof by appropriate legislation have the right to, and can require the reading or study of the Bible in the public and private schools, and they can likewise authorize religious instruction to the pupils so long as it is not restricted to any specific church, sect, or denomination; and such reading or study is not prohibited by the first amendment of the constitution, ratified finally in 1791, as it is only a restriction of the power of Congress and not of the several states, and only applies to "establishments" of religion as a specific church, sect, or denomination.

Reading or study of the Bible or religious instruction in the public and private schools is not prohibited by the fourteenth amendment of the constitution of the United States, ratified July 28, 1868.

The Bible and religious teaching thereunder is beneficial and uplifting to all and does not come within any of the teachings which the United States Supreme Court says the state can prohibit, therefore, the state cannot prohibit the reading and study of the Bible in either the public or private schools, and parents and pupils have the right to demand the reading and teaching of the Bible in the public and private schools of their communities.

In the petition for appeal to the Supreme Court of the United States, Mr. Clithero and the others contended that "a denial of the things demanded would be a denial to petitioners of their rights and privileges guaranteed under the laws and constitution of the United States."¹⁴

Appellees pointed out that no federal question was involved.¹⁵ The state Supreme Court had denied the appellants the order sought to require appellees as members of the Board of Education of the state of Washington to make Bible reading and instruction compulsory in the public schools of the state, on the grounds that the court cannot by mandamus control the discretion of an administrative board of officers in whom has been vested discretionary power, and on the grounds that Article 1, Section 11, of the state constitution forbids religious worship, exercise, or instruction in the public school system. It would thus be impossible, they held, for the board to make Bible reading and instruction a part of the public school curriculum even should they so choose.

Appellees contended that the only question before the Supreme Court of the United States was this: "Is a state prohibition against Bible reading and instruction in its public schools violative of any rights guaranteed by the federal constitution, the Declaration of Independence, or the Enabling Act?"¹⁶ In answer to this question the appellees contended that the federal constitution makes no provision for protecting the citizens of the states in their religious liberties but that this is left to the state constitutions and laws, that the preamble contains no reference to religion or religious liberties, that Article 6 does not apply to the states, that the first amendment merely places a restriction on Congress, and that the fourteenth amendment makes no mention of religion.

¹⁴ George I. Clithero et al. v. N. D. Showalter as State Superintendent et al., No. 80, 284 U.S. 573.

¹⁵ Appellees' Statement against Jurisdiction, Clithero v. Showalter, *ibid.*

¹⁶ *Ibid.*

Appellees pointed out that the Declaration of Independence does not have the force of organic law and that there is no guarantee in that document of the right of appellants to have the Bible read and studied in the public schools; that Section 4 of the Enabling Act of 1889 provides "that the perfect toleration of religious sentiment shall be secured and that no inhabitant of said state[s] shall ever be molested in person or property on account of his or her mode of religious worship"; and that, finally, the United States Supreme Court will not pass upon abstract questions or render decisions that would not bring relief.

As we have seen, the Supreme Court of the United States dismissed the case for lack of a substantial federal question.¹⁷ The case is unique in that it was the first in which the attempt was made to compel Bible reading. As we shall see, in other cases litigation was carried on in an effort to prevent Bible reading on the grounds that it constituted an infringement of religious liberty. The action of the Supreme Court was what might have been expected; it leaves the question of Bible reading to the states, where it was before this case arose.

¹⁷ See above, p. 34.

CHAPTER III

BIBLE READING REQUIRED IN THE PUBLIC SCHOOLS

I. REQUIRED BY STATUTE

TWELVE states—Alabama, Arkansas, Delaware, Florida, Georgia, Idaho, Kentucky, Maine, Massachusetts, New Jersey, Pennsylvania, Tennessee—have statutes requiring Bible reading in the public schools. That of Alabama simply requires the teacher to read once every school day “readings from the Holy Bible.” In Delaware the law requires that “at least five verses from the Holy Bible shall be read . . . at the opening of such school”; in Pennsylvania that “at least ten verses from the Holy Bible” be read each day; in Georgia that the “Bible, including the Old and the New Testament,” shall be read and that not less than one chapter is to be read each day at some appropriate time; and in Idaho that the readings be taken from a selected list of passages from the standard American version of the Bible, furnished from time to time by the State Board of Education, and that from twenty to thirty verses are to be read each day. The Maine statute requires, in addition to the reading of the Scriptures, special emphasis upon the “Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount, and the Lord’s Prayer.” That of Tennessee stipulates that “the same selection shall not be read more than twice a month.”¹

Of the twelve states having statutes requiring Bible read-

¹ Alabama Laws, 1919, Act No. 459, Section 1; Delaware Laws, 1923, Chapter 182, Section 2; Purdon’s Pennsylvania Statutes, 1941, Title 24, Section 1555; Georgia Political Code, 1926, Section 1551; Revised Statutes of the State of Maine, 1930, Chapter 19, Section 125; Code of Tennessee, 1932, Section 2343 (Law of 1925).

ing, eight—Arkansas, Florida, Idaho, Kentucky, Maine, Massachusetts, New Jersey, and Pennsylvania—require that no comments be made. The Idaho statute stipulates that if a pupil raises a question calling for comment or explanation, the teacher must, without comment, refer the inquirer to his parents or guardians for reply.² Five states—Alabama, Delaware, Florida, Maine, and Pennsylvania—have no provision for excusing pupils during the Bible reading period. Georgia, Idaho, New Jersey, and Tennessee have made statutory provision for excusing pupils during such reading at the request of parents or guardians. In Kentucky and Massachusetts pupils who have conscientious scruples against such reading may, upon the request of parent or guardian, be excused from taking any personal part in the reading.³ In Maine pupils must give respectful attention but may be free in their own form of worship.⁴

The penalties for failure to comply with the statutes requiring Bible reading may be divided into two groups: those imposed upon the teacher who fails to enforce the statute requiring Bible reading, thereby making herself subject to the revocation of her certificate, and thus to dismissal; and those that make the school ineligible to draw on the public school funds because of the teacher's failure to comply with the law.

COURT CASES

In four of the twelve states requiring Bible reading—Maine, Massachusetts, Kentucky, and Georgia—cases have been carried to the highest courts to test the validity of such statutes. In all four the constitutionality of the statutes requiring Bible reading has been upheld.

Maine.—One Donahoe brought suit against the super-

² Compiled Statutes of Idaho, Section 3 (Laws of 1925, Chapter 35).

³ The statutes of Kentucky and Massachusetts do not make provision for excusing the children during such reading but simply excuse them from taking part in the reading.

⁴ Revised Statutes of the State of Maine, 1930, Chapter 19, Section 125.

intendent of the school committee of the town of Ellsworth for expelling his daughter from school for her refusal to read a Protestant version of the Bible as ordered by her teacher, such reading being a part of the general course of instruction.⁵

The court held that the regulation adopting the King James version of the Bible as a textbook was constitutional and did not infringe upon the rights of conscience or the right of freedom of worship and that it was binding on all the members of the schools even though they were of different religious faiths. Thus in this case the constitutionality of Bible reading hinged upon the claim that it was being used as a textbook for reading. The court upheld the legislation placing the power of book selection in the hands of a committee, saying:

The power of selection is general and unlimited. It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the state.

The court pointed out that a committee might for the time being prefer one version of the Bible to another; that any version might be used in the schools or excluded; that one committee might direct the use of one version, and another of a different version, according to their "respective views of expediency"; and that the adoption of any particular version by the committee did not place a sanction of "purity" of text or accuracy of translation upon that version.

Massachusetts.—The school committee of the town of Woburn required that the schools be opened each morning with reading from the Bible and prayer, and that during the prayer the scholars should bow their heads. The plaintiff in a Supreme Court case,⁶ a student named Ella R. Spiller, objected to the latter portion of this order. The committee

⁵ *Donahoe v. Richards*, 38 Me. 376 (1854).

⁶ *Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866).

thereupon modified it by directing that any pupil might be excused from bowing the head upon request from his parents. Her father declined to make such request, whereupon his daughter was dismissed from school.

The court held that the committee of the town might lawfully pass an order requiring schools to be opened each morning by reading from the Bible and by prayer, and that during prayer each pupil should bow his head unless his parents requested that he be excused. The court said, however, that it would not be competent to a school committee to pass an order or regulation requiring pupils to conform to any religious rite or observance or to participate in any religious forms or ceremonies that were inconsistent with or contrary to their religious beliefs or conscientious scruples, since to do so would violate the spirit of the religious liberty clause of the constitution of Massachusetts, which states that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments . . ."⁷

The girl had persisted in her refusal to bow her head during prayer, and it was under these circumstances that she was dismissed until she should comply or her parents should make request that she be excused from such participation. The position was taken that the act prescribed was not necessarily one of devotional or religious ceremony and that it went no further than to require the observance of quiet and decorum during the religious exercises at the opening of school. It did not compel a pupil to join in prayer but only to assume an attitude calculated to prevent interruption and general disturbance during such exercises, and the child might be excused from even this limited participation upon the request of the parent. Under these circumstances the court felt that the exclusion of the child from school was justifiable and furnished no ground for action.

⁷ Constitution of Massachusetts, Part 1, Article 2.

Kentucky.—Thomas Hackett, a Roman Catholic school patron, complained of the religious services held during school hours with the children, services consisting of prayers, denominational hymn singing, and reading from the King James version of the Bible.⁸ It was contended that these exercises constituted an appropriation of public funds in aid of sectarian schools in violation of the following provisions in the constitution and the statute, respectively:

nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place . . . nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed . . . No human authority shall . . . interfere with the right of conscience.

No portion of any fund or tax now existing or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.⁹

It was further contended that these religious exercises violated the statutory provision that

No books or other publications of a sectarian . . . character shall be used or distributed in any common school; nor shall any sectarian . . . doctrine be taught therein.¹⁰

The reading of the Bible by the teacher was without comment, in compliance with the state statute, and no child was required to read the Bible against the wish of his parent or guardian. The prayer offered by the teacher which, it was urged, made the school sectarian was reported as follows:

Our Father, who art in Heaven, we ask Thy aid in our day's work. Be with us in all we do and say. Give us wisdom and strength and patience to teach these children as they should be taught. May teacher and pupil have mutual love and respect. Watch over these children both in the schoolroom and on the playground. Keep them from being hurt in any way, and at last

⁸ *Hackett v. Brooksville Graded School District*, 120 Ky. 608, 87 S.W. 792 (1905).

⁹ Constitution of Kentucky, Bill of Rights, Sections 5, 18⁹.

¹⁰ Kentucky Statutes, 1930, Section 4368.

when we come to die may none of our number be missing around Thy Throne. These things we ask for Christ's sake. Amen.

Although the court conceded that any prayer is worship and that public prayer is public worship, it held that the prayer offered and the reading of the Bible were not sectarian within the meaning of the constitution or the statutes, that the appellant's children were not compelled to attend the place where the worshiping was done during prayer, that the school was not "a place of worship" nor its teachers "ministers of religion" within the meaning of the constitution as quoted above,¹¹ and that the Bible is not a sectarian book when read without comment. According to the Kentucky court, a book is not sectarian unless it teaches the peculiar dogmas of a sect as such; it cannot be regarded as sectarian simply because it is so comprehensive as to include the partial interpretation of the adherents of certain sects, because it is edited or compiled by persons of a particular sect, because it has been adopted by certain denominations as authentic, or even because it has been accepted by them as being inspired. "It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents that give it its character," said the court.

Georgia.—The city commission of the city of Rome, Georgia, passed an ordinance requiring some portion of either the Old or the New Testament of the King James version to be read without comment, and prayer to be offered to God in the presence of the students during the regular school session. Readings and prayers were to be conducted daily by the principal or by some other person appointed by them to take charge of such services. Pupils might be excused, on the ground of conscientious objections, from hearing the Bible read or from prayer upon the written request of parent or guardian to the superintendent of schools. A mandamus was sought to require the Board of

¹¹ Constitution of Kentucky, Bill of Rights, Section 5.

Education of Rome to enforce this ordinance.¹² The question of the constitutionality of the city ordinance was raised.

The issues here involved were whether or not Bible reading and prayer in the public schools is a violation of the rights of conscience within the meaning of the constitutional provision, "All men have the natural and inalienable right to worship God, each according to the dictates of his own conscience, and no human authority should in any case control or interfere with such right of conscience." Does it constitute sectarian use of public funds in violation of the constitutional provision, "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution"?¹³

The court held that the ordinance requiring the reading of the Bible and prayer is not in conflict with the constitution of Georgia, nor does this practice constitute the sectarian use of public funds. To the contention that the enforcement of the ordinance would be to give the school children instruction in the teachings of the Bible that was contrary to the beliefs of the Roman Catholic church and of those of the Jewish faith, the court said:

It would require a strained and unreasonable construction to find anything in the ordinance which interferes with the natural and inalienable right to worship God according to the dictates of one's own conscience. The mere listening to the reading of an extract from the Bible and a brief prayer at the opening of school exercises would seem far remote from such interference.

It was further argued that "an insignificant fraction of their [the principals'] time would be consumed in the reading." The court pointed out that in Georgia, as in other colonies, church and state were not completely separated, nor was it intended by the founders that they should be.

Mr. Justice Hines dissented from the majority opinion in

¹² *Wilkerson v. City of Rome*, 152 Ga. 763, 20 A. L. R. 1535 (1921).

¹³ Constitution of Georgia, Article 1, Paragraphs 12, 14.

this case. "Being committed," he said, "with my whole soul to the doctrine of religious freedom, including freedom from molestation in matters of conscience, I feel in duty bound to give vent to my inability to agree to the conclusion reached by my able associates." He contended that the ordinance violates the right secured by the above-quoted constitutional provisions; that the constitution pledges the government to defend the "natural and inalienable right of the individual to worship God according to the dictates of his own conscience"; and "that no human authority, not even the board of commissioners of the City of Rome, shall in any case control or interfere with such right of conscience." He pointed out that the ordinance in question establishes a system of worship for the schools of Rome and in so doing controls or interferes with the individual worship of God, that religious freedom includes the right not to worship at all, and that even the exemption of certain classes does not make the ordinance constitutional. The reading of the King James version offends Catholics and Jews, the reading of certain texts is out of harmony with the beliefs of some sects of Protestants, and the system of worship provided offends deists, atheists, and agnostics. "We cannot disguise the fact," said Justice Hines, "that making the reading of the King James version of the Bible a part of the worship of the public schools puts municipal approval upon that version, and thus discriminates in favor of and aids the Protestant sects of the Christian religion."

It should be kept in mind that the cases considered above have arisen in states that have statutory provisions requiring the daily reading of the Bible in the public schools.

II. REQUIRED BY ADMINISTRATIVE ORDER

Among the rules of the Board of Education for the District of Columbia is this provision regarding the reading of the Bible in the public schools:

Each teacher shall, as a part of the opening exercises, read, without note or comment, a portion of the Bible, repeat the Lord's Prayer, and conduct appropriate singing by the pupils.¹⁴

It should be noted that the ruling contains no provision for excusing pupils during the reading of the Bible, singing, or prayer, but it does provide that the Bible must be read without comment. The reading of the Bible is considered to be "universal" and the superintendent of schools in commenting upon the operation of the ruling says, "This regulation has been in operation for years in the public schools of the District of Columbia, and I think is systematically carried out. It has become such a settled policy that it provokes no discussion of the matter."¹⁵ The Board of Education authorizes the excusing of pupils to observe church holy days.¹⁶

¹⁴ By-Laws and Laws of the District of Columbia Board of Education, 1926, Chapter 6, Section 4.

¹⁵ Frank W. Ballou, superintendent of schools, District of Columbia, in a letter to the author, November 4, 1932.

¹⁶ By-Laws and Laws of the District of Columbia Board of Education, 1926, Chapter 8, Section 14.

CHAPTER IV

BIBLE READING PERMITTED IN THE SCHOOLS

I. STATES IN WHICH BIBLE READING IS SPECIFICALLY PERMITTED

INDIANA, Iowa, Kansas, Mississippi, North Dakota, Oklahoma, and South Dakota have statutes specifically permitting the reading of the Bible in the public schools. These statutes are practically identical, the common wording being that any prohibitions mentioned shall not be construed to "deny the reading of the Holy Scriptures in the public schools." In all seven states the reading of the Bible is optional either with the teachers or with the school boards. Two of these states, namely, Iowa and North Dakota, have statutory provisions excusing pupils during such reading upon the request of parents or guardians.

North Dakota requires that any school supported by public taxes shall display a placard containing the "Ten Commandments of the Christian religion in a conspicuous place" in every classroom.¹ The department of public instruction has the authority to have such placards printed and may charge for their printing and distribution among the schools of the state.

Mississippi has a statute requiring "a suitable course of instruction in the principles of morality and good manners, prepared by the state board of education," which must be used in all the public schools of the state. The course must "include what is known as the Mosaic Ten Commandments and may be so graded with the idea that a certain amount of time will be devoted to it in each grade."² The

¹ Laws of North Dakota, 1927, Chapter 247, Section 1.

² Mississippi Code, 1930, Section 6646.

statute stipulates further that no pupil may be required to take this course if his parent or guardian requests the superintendent or teacher in writing that the child be excused from doing so.

COURT CASES

In three of the states—Kansas, South Dakota, and Iowa—disputes have arisen over some aspect of Bible reading and have been carried to the highest court of the state for settlement.

Kansas.—In the case brought before the court of this state³ a public school teacher, for the stated purpose of quieting the pupils and preparing them for their regular studies, repeated the Lord's Prayer and the Twenty-third Psalm without comment or remark as a morning exercise.⁴ Pupils were not required to participate. A pupil was expelled, however, for refusing to refrain from regular work and to preserve order during the exercises. The constitution of Kansas requires that

No religious sect or sects shall ever control any part of the common school or university funds of the state.⁵

No money shall ever be given by law to any religion . . . nor to any particular creed, mode of worship, or system of ecclesiastical policy nor shall any person by law be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, . . . nor shall any man be compelled to send his child to a school to which he may be conscientiously opposed. . . . No portion of any public fund shall be appropriated to, or used by or in aid of any church, sectarian or denominational school.⁶

A statute provides that

No sectarian or religious doctrine shall be taught or inculcated

³ *Billard v. Board of Education of Topeka*, 69 Kans. 53 (1904).

⁴ Comments on the statement that the "repetition of the Lord's Prayer and the Twenty-third Psalm was intended merely to quiet the children" are found in an article on "The Bible in Public Schools," in *Law Notes*, September, 1930, p. 119.

⁵ Constitution of Kansas, Bill of Rights, Article 6, Section 8.

⁶ *Ibid.*, Section 5.

in any of the public schools . . . but nothing in this section shall be construed to prohibit reading of the Holy Scriptures.⁷

The court held that the teacher was not conducting a form of religious worship nor teaching sectarian or religious doctrine, and that the exercises in question did not constitute a misuse of public funds. It took the position that there was not the slightest effort on the part of the teacher to inculcate any religious dogma. It held that though the constitution and the statutes of Kansas prohibit all forms of religious worship and the teaching of sectarian or religious doctrine in the public schools, there is nothing in either the constitution or the laws that can be interpreted as intended to exclude the Bible from the public schools. The constitution imposes upon the legislature the duty to "encourage the promotion of intellectual, moral, scientific, and agricultural improvement by establishing a uniform system of public schools."⁸ The Bible, it was contended, contains the "noblest ideals of moral character. . . . To emulate these is the supreme conception of citizenship."

South Dakota.—In a case tried in 1929 action was brought against the school board of District No. 8 of Meade County, which had ordered that the Bible be read or the Lord's Prayer be repeated.⁹ No sectarian comment was to be made. Pursuant to this order, passages from the King James version of the Bible were read or the Lord's Prayer was repeated as an opening exercise. Some twelve or fifteen Catholic children refused to attend the opening exercises, whereupon they were expelled and were not allowed to return without signing a written apology. As we have seen, South Dakota has a statute permitting the reading of the Bible without sectarian comment. No statutory provision is made, however, for excusing children during such exercises. Her constitution provides that

⁷ Revised Statutes of Kansas, 1923, Chapter 72, Section 1722.

⁸ *Ibid.*, Article 6, Section 20.

⁹ State ex rel. Finger v. Weedman et al., School District Board, 226 N.W. 348, Supreme Court of South Dakota, June 27, 1929.

The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions . . . No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.¹⁰

Not only was the King James version of the Bible being read, which offended the Catholic pupils and their parents, but the Catholic children were compelled to attend such reading under penalty of expulsion.

The Supreme Court of South Dakota ordered that a mandamus be issued to compel the school board to readmit the children without apology and thereafter to permit them to absent themselves during the reading of the King James version of the Bible.

The court emphasized that the primary object to be obtained was to insure personal freedom of conscience and to prevent the support of any religious organization or sect of the state by public taxes. The evidence disclosed that the reading of the Bible in this case was not for a secular purpose but for the purpose of "increasing, improving, and inculcating morality, patriotism, reverence, and the developing of religious and Christian character of the pupils."

The court declared that the Bible did not lend itself to use in secular instruction without comment and analysis and that no other book is read to the pupils of the public school under similar circumstances; that the legitimate function of our public schools is to impart secular knowledge to the pupils; and that comment in connection with such instruction is not only unrestricted but is necessary. The very limitation placed on comment in connection with the reading of the Bible "discloses the purpose of the order of the school

¹⁰ Constitution of South Dakota, Article 6, Section 3.

board to enter the field of religious instruction, but not into sectarian controversy."

As soon as public education enters the field of religion, differences arise among the several sects as to the authenticity of the Scriptures. The various versions of the Bible are challenged, and one organization begins quarreling with another. Questions arise as to modes of worship and the construction to be placed on certain passages in the Bible. The primary object of the religious liberty provisions in our constitutions is to prevent the persecution that might arise from an arbitrary answer to such questions as these. In this South Dakota case, not only was the King James version of the Bible read but Catholic children were compelled to attend such reading under penalty of expulsion. Thus the question was whether such reading, by forcing attention on the religious beliefs of these children, violated the pledge of liberty of conscience as stated in the constitutional provision that "the right to worship God according to the dictates of conscience shall never be infringed."¹¹

The relief sought in this case was the reinstatement of the relator's son in school with liberty to absent himself during the reading of the Bible. The desired relief was granted, and that was all that was settled, though the whole tenor of the case is decidedly adverse to Bible reading in the public schools.¹²

Iowa.—The question of the constitutionality of the Iowa statute was raised in the case of *Moore v. Monroe*.¹³ The teachers of the school concerned were accustomed to occupy a few minutes each morning in reading selections from the Bible, in repeating the Lord's Prayer, and in singing religious songs. Complaint was brought by a taxpayer who had two children in the school. Although his children had not been required to be present during the time devoted to the reli-

¹¹ *Ibid.*

¹² Further mention will be made of this case in Chapter VI.

¹³ *Moore v. Monroe*, 64 Ia. 367, 20 N. W. 475 (1884).

gious exercises, he nevertheless objected to such exercises on the ground that the statute was unconstitutional—a violation of the religious liberty clause of the constitution of Iowa, which reads,

The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister.¹⁴

The reading of the Bible was carried on by sanction of the Iowa statute which reads:

The Bible shall not be excluded from any public school or institution in the state, nor shall any child be required to read it contrary to the wishes of his parent or guardian.¹⁵

The court held that this statute was not in violation of the constitution but that it is optional with the individual school teachers as to whether or not they will use the Bible in the schools, and that such option is restricted only by the provision that no child shall be required to read the Bible contrary to the wishes of his parents or guardians. The court deemed that the object of the constitutional provision stipulating that no person should be compelled to attend any place of worship nor to contribute to the maintenance of any place of worship or any minister was not to prevent the casual use of a public building as a place for offering prayer or doing other acts of religious worship but rather to prevent the enactment of a law whereby any person may be compelled to pay taxes for any building used distinctively as a place of worship.

The court held that the religious objection on the part of the plaintiff did not pertain to the matter of taxation. Rather the objection was to the practice of making religious exercises a part of the educational system, into which the plaintiff's children must either be drawn or be made conspicuous

¹⁴ Constitution of Iowa, Article 1, Section 3.

¹⁵ Code of Iowa, 1931, Section 4258.

and inconvenienced by being excused. To this the court answered, "But, so long as the plaintiff's children are not required to be in attendance at the exercises, we cannot regard the objection as one of great weight."

In the cases considered above it will be noted, in the first place, that the statutes in all three states involved, Kansas, South Dakota, and Iowa, made Bible reading permissible. The statutes of Kansas and South Dakota specify that if the Bible is read in the public schools such reading must be without comment. Though the statute of Iowa does not contain this provision it does provide that no child shall be "required to read it [the Bible] contrary to the wish of his parent or guardian," which provision is found in neither the Kansas nor the South Dakota statute.

In all three states the religious exercises objected to in the suits brought to the courts consisted of Bible reading, religious songs, and prayer. No sectarian comments had been made in connection with the Bible reading, nor were there any charges to that effect. The cases in Iowa and Kansas were similar. In both it was charged that the schools were made places of worship and that public funds had been appropriated contrary to the constitutions and statutory provisions of the respective states. The opinions rendered by the courts were in agreement in declaring that the exercises complained of did not make the schools places of worship within the meaning of the constitutions, nor did they constitute the appropriation of public funds for sectarian purposes.

In the case before the South Dakota court, however, while the Bible reading took place without sectarian comment, pupils had been required to attend the exercises. Because of failure to attend, the pupils in question had been expelled, and a mandamus was sought to compel the school board to readmit them without apology and thereafter to permit them to absent themselves during the reading of the King James version of the Bible. The court granted the aid sought by plaintiffs and that was as far as the case went. However, the

decision was in general adverse to Bible reading in the public schools. The court took the position that the practice complained of constituted religious worship, was necessarily devotional, was sectarian, and hence was contrary to the principles of the constitution.

II. BIBLE READING PERMITTED BY COURT DECISIONS IN ABSENCE OF STATUTES

In a number of states where there are no constitutional or statutory provisions specifically prohibiting or permitting Bible reading, cases have been carried to the state Supreme Courts for opinions on the subject. Some of the courts have upheld Bible reading. In the majority of the cases the courts have left it to the discretion of the state or local school authorities, although in some cases they have prohibited such reading.

Texas.—The question came up in the state of Texas in 1908, in the case of *Church v. Bullock*.¹⁶ An action was brought by Church, an unbeliever, two Catholics, and two Jews against Bullock and other members of the board of school directors of the city of Corsicana to abolish in the public schools of that city the practice of holding morning exercises consisting of reading from the Bible, repeating the Lord's Prayer, and singing religious songs. The reading of the Bible was without comment, and the King James version was used. Students were requested to take part. They were asked to stand and bow their heads when the Lord's Prayer was offered, although they were not required to participate in prayer. The exercises were conducted in pursuance of a resolution adopted by the board of school directors of the district. The resolution did not require but stated that they did "view with favor" such opening exercises. The pupils were required to be present during the exercises and to behave in an orderly manner.

¹⁶ 109 S. W. 115.

The constitution of Texas contains the following provisions:

All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect, or support any place of worship or to maintain any ministry against his consent. No human authority ought . . . to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.¹⁷

No money shall be appropriated or drawn from the treasury for the benefit of any sect, . . . nor shall property belonging to the state be appropriated for any such purposes.¹⁸

And no law shall ever be enacted appropriating any part of the permanent or available school fund to any other purpose whatever; nor shall the same, or any part thereof, ever be appropriated to or used for the support of any sectarian school . . .¹⁹

In addition to the above constitutional provisions a Texas statute provides:

No part of the public school fund shall be appropriated to or used for the support of any sectarian school.²⁰

The court by unanimous decision held that the practices here complained of did not convert the school into a sectarian or religious society within the meaning of the constitution, that it was not a violation of the religious liberty clause, and that it did not constitute an appropriation of public funds for sectarian or religious purposes. The word "sect," according to the court's definition, is "a body of persons distinguished by particularities of faith and practice from other bodies and adhering to the same general system," and "a religious society is a voluntary association of individuals or families united for the purpose of having a common place of worship and to provide a proper teacher to instruct them

¹⁷ Constitution of Texas, Article 1, Section 6.

¹⁸ *Ibid.*, Article 1, Section 7.

¹⁹ *Ibid.*, Article 7, Section 5.

²⁰ Texas Civil Statutes, 1928, Article 2899.

in religious doctrines and duties, and to administer the various ordinances of religion." The school as conducted did not come within the court's definition of either a sect or a religious society, nor did the practice in question make the school "a place of worship" within the meaning of the constitution, for such was declared to be a place where persons meet together for the purpose of worshipping God.

It was admitted that "the right to instruct the young in the morality of the Bible might be carried to such an extent in the public schools as would make it obnoxious to the constitutional inhibition, not because God is worshiped, but because by the character of the services the place would be made 'a place of worship.'"

Colorado.—In 1927 a mandamus action²¹ was sought by the people in relation to Charles L. Vollmar against George K. Stanley, president of the Board of Education, District 118, Weld County. The plaintiffs were Catholic school patrons. The board required the teacher, as a part of the morning exercises in each classroom, to read portions of the King James version of the Bible without comment. The pupils were not permitted to leave the room during the reading. The court held that the reading of the Bible without comment in the public schools was not a violation of the fourteenth amendment of the federal constitution (which states: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."),²² nor of the following provisions of the Colorado constitution:

That the free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed. . . . No person shall be required to attend or support any ministry or place of worship. . . . Nor shall any preference be given by law to any religious denomination or mode of worship.²³

²¹ *People v. Stanley*, 81 Colo. 276, 255 Pac. 610. The Supreme Court of Colorado decided the case March 28, 1927. A rehearing was denied May 9, 1927.

²² Section 1, Paragraph 1.

²³ Article 2, Section 4.

Neither the general assembly, nor any county . . . shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church, or sectarian society, or for any sectarian purpose, or to help support or sustain any school, . . . to any church, or for any sectarian purpose.

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools . . .²⁴

The court did hold, however, that attendance of children during the time of such opening exercises must be optional. It reasoned that inasmuch as children have the right to attend either public or private schools, they may be compelled to take the courses that are essential to good citizenship. While it admitted that there is undoubtedly much in the Bible that is essential to good citizenship, it felt that those essentials might be taught from other books than the Bible. Therefore the Bible as such is not so essential to good citizenship that the parents may not exclude it from the instruction of their children; consequently "children cannot be required, against the will of their parents or guardians, to attend its reading." The court concluded that the Bible may be read without comment in the public schools and that children, upon the request of their parents, may be excused from such reading, but whenever comment on the Bible or the reading of a given part of the Bible is claimed to constitute sectarian teaching, the courts will take that phase of the question into consideration.

It should be noted that in these two cases in Texas and Colorado the constitutional and statutory provisions were very similar. In the Texas school the board of trustees had passed a resolution that they "view with favor" these opening exercises. In the Colorado school the board required

²⁴ Article 9, Sections 7, 8.

such reading in connection with the morning exercises. In both schools the reading was from the King James version, without comment. In the process of reasoning the Texas court arrived at the conclusion that the pupils need not be excused. In other words, they were required to be present and to bow their heads while prayer was offered, though they did not have to participate in the prayer; and in the Colorado case the court decided that the exercises were not contrary to the constitution but that pupils must be excused during such exercises at the request of parents or guardians. This is an example of conflicting opinions rendered by courts on this question of Bible reading in the public schools.

III. DECISIONS LEAVING BIBLE READING TO ADMINISTRATIVE DISCRETION

Minnesota.—The case of *Kaplan v. Independent School District of Virginia*²⁶ involved the school board of Virginia, Minnesota, which had been requested by the Ministerial Association of that city to place a copy of the Bible in every schoolroom and to direct the superintendent to make suitable selections to be read daily without comment by the teacher in each room at the opening of school. The school board had concurred in the request and had placed the King James version in every schoolroom. The superintendent made suitable selections from the Old Testament only. If parent or pupil objected, the pupil might retire from the room during such reading. Action was brought to prohibit the reading of these selections on the grounds that they violated the following constitutional provisions:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed, . . . nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; . . . nor shall any money be drawn from the treasury for the benefit of any religious societies . . .

²⁶ 214 N. W. 18 (1927).

But in no case shall . . . any public moneys or property be appropriated or used for the support of schools wherein the distinctive doctrines, creed, or tenets of any particular Christian or other religious sect are promulgated or taught.²⁶

The court held by a divided decision that no constitutional provision is infringed by the practice of reading the Bible, that the purpose of the school board in having the Bible read was to implant in the minds of the pupils higher moral and ethical standards and a knowledge of the Bible, and that it was not its purpose to teach any religious doctrine. The majority opinion held that so long as pupils were not compelled to worship according to the tenets of any creed or taught any sectarian belief or even required to be present at all, there was no violation of the constitutional guarantee of religious liberty. In regard to the wisdom of the practice of reading extracts from the Bible they did not express an opinion; that, they said, was "left to the local school board."

Mr. Justice Stone in a separate opinion upholding Bible reading took the position "that there is no legal and particularly no constitutional objection to such compulsion if it should be attempted." Thus he considered it "simply considerate and tactful, rather than legally necessary, to permit certain children to absent themselves during the Scripture reading. . . . It is the difficulty of using the Bible without giving the instruction a sectarian bend that makes the wisdom of its use in the public schools questionable."²⁷ Since the exercises here complained of were not contrary to the constitution, the court left the question of whether or not the Bible should be read in the public schools to the discretion of the school authorities. The position it took was similar to that taken by the courts of a few states, namely, that where the legislatures have vested the administration of public education in the school boards or commissions, the courts will not interfere with such regulations unless it is clearly shown

²⁶ Article 1, Section 16; Article 8, Section 3.

²⁷ In this case a very able dissenting opinion was rendered by Chief Justice Wilson. It will be considered in Chapter VI.

that abuses exist. The cases that have come up in Michigan, Nebraska, and Ohio²⁸ are examples of such practice.

Ohio.—On this basis the Supreme Court of Ohio upheld a resolution passed in 1872 by the Board of Education prohibiting religious instruction and the reading of religious books, including the Bible, in the public schools of Cincinnati. Twenty-three years later a decision of the Court of Common Pleas sustained a rule of the school board requiring Bible reading.²⁹

Michigan.—In this state school patrons sought an order to compel the Board of Education of the city of Detroit to discontinue the use in the public schools of a book entitled *Readings from the Bible*.³⁰ This volume was made up almost entirely of extracts from the Bible emphasizing the moral precepts of the Ten Commandments. No comments were made by the teacher upon the matter contained, and she was required to excuse from that part of the session during which it was used any pupil whose parent or guardian should so request. While the court, in a divided opinion, held that no constitutional right of the complainant had been violated, it left the question of Bible reading to the discretion of the State Board of Education. The case did not involve directly the reading of the Bible or any particular version of the Bible but rather the reading of a book made up of extracts from the Bible.

The contention by the court that a school board might teach the Christian religion was assailed in the dissenting opinion:

If their position is sound, not only should the Bible be taught, but all other forms of Christian religious instruction should be given in the schools. If this reasoning is sound, the constitution left it open to the school authorities to determine what variety

²⁸ *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560 (1898); *State v. Scheve*, 65 Nebr. 853, 91 N. W. 846 (1902); *Board of Education of Cincinnati v. Minor et al.*, 23 Ohio St. 211 (1872).

²⁹ *Board of Education of Cincinnati v. Minor et al.*, 23 Ohio St. 211 (1872); *Nesle v. Hum*, 1 Ohio N. P. 140 (1895).

³⁰ *Pfeiffer v. Board of Education of Detroit*, 118 Mich. 560 (1898).

of Christian religion they should teach, and the school board of the city of Detroit has the power today to have taught in the public schools of the city of Detroit the theological tenets of any Christian church.

Our constitutional provisions respecting religious liberty mean precisely what they declare.

The Michigan constitution provides:

Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion. The civil and political rights, privileges and capacities of no individual shall be diminished or enlarged on account of his religious belief.⁸¹

Authority whereby the legislature may compel "a person to pay taxes for the support of a teacher of religion, or diminishing or enlarging the civil rights of any person on account of his religious belief" is forbidden, said the dissent.

The opinion rendered by the Michigan attorney-general is adverse to Bible reading. The question of Bible reading is, however, left optional with the local school board or teacher. According to the state superintendent of public instruction "very few" of the public schools in the state have Bible reading.⁸²

IV. BIBLE READING OPTIONAL WITH SCHOOL AUTHORITIES IN ABSENCE OF SPECIFIC STATUTES OR COURT DECISIONS

In Connecticut, Maryland, Missouri, Montana,⁸³ New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia no consti-

⁸¹ Constitution of Michigan, Article 2, Section 3.

⁸² Answer to questionnaire by Superintendent Webster H. Pearce, state superintendent of public instruction, October 31, 1932.

⁸³ Montana and West Virginia have a course of study in Bible history which has been adopted by the State Board of Education, in which credit may be received and applied toward graduation when pursued out of school hours under certain rules and regulations.

tutional or statutory provision specifically requires, prohibits, or permits Bible reading in their public schools, nor has the question of Bible reading been carried to the courts in any of these states.⁸⁴

In reply to a questionnaire sent out in October and November of 1932 to state departments of education, these twelve states reported that Bible reading in the public schools is optional with the school authorities. To the question "In what percentage of the public schools in your state would you say that the Bible is daily read?" Connecticut replied, 50 per cent; Missouri, "very small"; Montana, "less than 10 per cent"; New Hampshire, "commonly read"; North Carolina, "large number"; Oregon, "very few"; Rhode Island, "negligible"; South Carolina, "widely read"; Vermont, "very few"; Virginia, "a majority"; and West Virginia, 25 per cent. Maryland failed to answer the question.

⁸⁴ Nebraska might be placed in this group of states in which the practice is optional, for, while a case has been carried to her courts, the question considered was that of sectarian instruction, and the legality of Bible reading was not decided, but by the decision of the court it was left to the school authorities to determine whether or not the Bible might be read. *State v. Scheve*, 65 Nebr. 853.

CHAPTER V

BIBLE READING PROHIBITED IN THE SCHOOLS

I. PROHIBITION BY STATUTE IN ABSENCE OF COURT DECISION

NO STATE has any constitutional provision or statutory law that specifically prohibits, in the terms "Bible" or "Bible reading," the reading of the Bible in the public schools. The question is whether it is permitted by the constitutions of the several states and by the statutory stipulations that no money raised for the support of public schools shall be appropriated for the support of any "sectarian" or "denominational" doctrine, that education may not be "sectarian" in character, that no "religious test shall be required," that no one shall be "compelled to attend any religious worship," that the "rights of conscience" shall be respected, that there shall be no restriction on the "free exercise and enjoyment of religious profession," and that "no discrimination shall be made against any church, sect, or creed of religion." That the question is debatable is evident from the number of cases that have been carried to the courts in an effort to interpret these provisions and from the fact that the courts have by no means been in agreement in their decisions.

Arizona.—The constitution and statutes of Arizona include these provisions:

No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school . . .

No sectarian instruction shall be imparted in any school or state educational institution that may be established under this constitution, and no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil . . .¹

¹ Constitution of Arizona, Article 9, Section 10; Article 11, Section 7.

Any teacher who shall use any sectarian or denominational books, or teach any sectarian doctrine, or conduct any religious exercises in his school, or who fails to comply with any provision of this chapter, shall be guilty of unprofessional conduct, and the proper authority shall revoke his certificate.²

It will be seen that the statute stipulates not only that the instruction must be nonsectarian and that no sectarian or denominational books may be used but also that no religious exercises may be conducted. Although no case has come to the courts of Arizona requiring the interpretation of this provision, the wording seems to preclude the reading of the Bible in all the public schools of the state. This interpretation is also in harmony with the position taken by the state superintendent of public instruction.³

California.—The State Educational Department interprets as a prohibition of Bible reading the California statute which states:

No publication of a sectarian, partisan, or denominational character must be used or distributed in any school, or be made a part of any school library; nor must any sectarian or denominational doctrine be taught therein.⁴

A further provision declares that any school board that knowingly allows any school to violate the above provision forfeits all right to any state or county apportionment of school moneys.⁵

Though no case has been brought before the courts of California directly involving the subject of Bible reading, an effort was made to prevent the purchase of twelve Bibles in the King James version for the library of the Selma Union

² Revised Code of Arizona, 1928, Section 1044 (Struckmeyer).

³ Superintendent C. O. Case, in answer to the questionnaire of October 31, 1932.

⁴ Constitution of California, Article 4, Section 30; Article 9, Section 8; School Code, Section 3.52 (Code of California, Section 1672). Interpretation given in reply to questionnaire of November 7, 1932, by superintendent of public instruction.

⁵ Statutes and Amendments to the Codes of California, 1931, Section 1672.

High School.⁶ Objections were raised on the ground that the Bible was a sectarian book and that as such its purchase for the public school library was contrary to the California statute quoted above and to the following constitutional provisions:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this state . . .

Neither the legislature, nor any county . . . shall ever make an appropriation, or pay from any fund whatever . . . in aid of any religious sect, church, creed, or sectarian purpose . . .

No public money shall ever be appropriated for the support of any sectarian or denominational school, . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this state.⁷

The court held that the King James version of the Bible is not a sectarian book, the purchase of which would violate these provisions. The mere purchase of such a book does not imply the adoption of the dogma it contains. No other case that has come before the courts has dealt with this particular question of whether the Bible may be placed in a public school library.

Nevada.—Bible reading is prohibited⁸ by constitutional and statutory provisions:

No sectarian instruction shall be imparted or tolerated in any school . . .

No public funds of any kind or character whatever . . . shall be used for sectarian purposes.

No books, tracts, or papers of a sectarian or denominational character shall be used or introduced in any schools established

⁶ *Evans v. Selma Union High School*, District of Fresno County, 222 Pac. 801, 31 A. L. R. 1121. The decision was rendered on January 24, 1924, and a rehearing was denied on February 21, 1924.

⁷ Constitution of California, Article 1, Section 4; Article 4, Section 30; Article 9, Section 8.

⁸ Position taken by State Educational Department in reply to the questionnaire of November 1, 1932.

under the provisions of this act; nor shall any sectarian or denominational doctrines be taught therein . . .⁹

New Mexico.—In this state, also, while no court decision has been returned, a constitutional and a statutory provision prohibit reading of the Bible in the schools:

No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.¹⁰

No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrines in the schools . . .¹¹

The use of any "sectarian or denominational books" or the teaching of "sectarian doctrine" in her schools not only subjects the teacher to immediate dismissal but bars the school from drawing upon the public funds.¹²

New York.—In the state of New York the superintendent of schools, by special act of the legislature in 1822, was given power to decide all controversies regarding the administration of the public schools. The superintendents pass upon the cases involving religious and sectarian influences in the public schools. The state attorney-general has declared that Bible reading in the public schools¹³ is contrary to the following constitutional provision:

Neither the state nor any subdivision thereof shall use its property or credit or any public money . . . in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.¹⁴

⁹ The first two provisions are from Article 11, Sections 9 and 10, of the constitution, the third from Nevada Compiled Laws, 1929, Section 5754.

¹⁰ Constitution of New Mexico, Article 12, Section 9.

¹¹ New Mexico Statutes Annotated, 1929, Chapter 120, Section 1102.

¹² *Ibid.*

¹³ University of the State of New York Bulletin, Law Pamphlet 6 (Albany, 1927).

¹⁴ Constitution of New York, Article 9, Section 4.

The report of the committee on education which submitted the above section (Article 9, Section 4) to the constitutional convention of New York in 1894, contains this significant paragraph:

"There is no demand from the people of the state upon this Convention so unmistakable, widespread, and urgent, none, moreover, so well-grounded in right and reason, as that the public school system of the state shall be forever protected by constitutional safeguards from all sectarian influence or interference, and that public money shall not be used directly or indirectly to propagate denominational tenets or doctrines. . . ." The arguments in favor of such a provision are, in our opinion, conclusive; and the objection that it will result in making the schools "Godless," or that such a constitutional prohibition would imply on the part of the people enacting it hostility, or even indifference, to religion, seem to us to be both groundless and absurd. In adopting this section the Convention will, in our opinion, most effectively aid all that is highest and best in religion, for, by establishing the principle that state education must necessarily be secular in its character, the field is left open beyond question or misunderstanding for religious teaching in the family, the Sunday school, and the church.¹⁵

Utah.—Moral education is permitted,¹⁶ but public aid of church schools is forbidden.¹⁷ The constitution and statutes of the state include the following provisions prohibiting Bible reading in the public schools:

The rights of conscience shall never be infringed. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or for the support of any ecclesiastical establishment.

The legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and be free from sectarian control.

¹⁵ University of the State of New York Bulletin, Law Pamphlet 6, p. 4.

¹⁶ Utah Laws, 1921, Chapter 95, Section 2.

¹⁷ Constitution of Utah, Article 10, Section 13.

The legislature shall provide for the establishment and maintenance of a uniform system of public schools, which shall be open to all children of the state, and be free from sectarian control.

Neither religious nor partisan test or qualification shall be required of any person, as a condition of admission, as teacher or student, into any public educational institution of the state.¹⁸

It shall be unlawful to teach in any of the district schools of this state while in session, any atheistic, infidel, sectarian, religious, or denominational doctrine and all such schools shall be free from sectarian control.

No partisan, political, or sectarian religious doctrine shall be taught or inculcated in the university, nor any political or religious test shall be required as a qualification of any student, professor, instructor, officer, or employe of the University of Utah.

Similar provisions apply to the State Agricultural College and the Branch Agricultural College.¹⁹

Wyoming.—The constitution specifies:

No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.

No sectarian instruction, qualifications, or tests shall be imparted, exacted, applied, or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.²⁰

The state superintendent of public instruction states:

The only reference to this matter [Bible reading in the public schools] occurring in the laws is the provision in our state constitution which prohibits any sectarian instruction. Because of this section, there is very little reading of the Bible done.

A few communities have provided religious instruction by allowing the students to go to their own churches on certain days.²¹

¹⁸ *Ibid.*, Article 1, Section 4; Article 3; Article 10, Sections 1, 12.

¹⁹ Utah Laws, 1921, Chapter 95, Section 1, and Chapter 117; 1925, Chapter 57, Section 1.

²⁰ Constitution of Wyoming, Article 1, Section 19; Article 7, Section 12.

²¹ Letter from Mrs. Katherine A. Morton to the author, November 3, 1932.

We now turn to the consideration of constitutional and statutory provisions which have been interpreted by the Supreme Courts of the several states as prohibiting the reading of the Bible.

II. PROHIBITION BY STATUTE AND COURT DECISION

Illinois.—In the case of *People v. Board of Education*,²² certain taxpayers and members of the Roman Catholic church of School District No. 24 brought action against the board of directors for requiring their children to listen to the reading of the King James version of the Bible. Comments upon the reading were made by the teacher. Pupils were required to stand and assume a devotional attitude as well as to answer questions on Bible passages.

The court was asked to decide, first, whether or not such exercises constituted a violation of freedom of worship as guaranteed by the constitution of Illinois, which says:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed . . . No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship . . .²³

and whether or not they were sectarian exercises for which public funds could not be used within the meaning of the following constitutional provision:

Neither the general assembly nor any county, city, town, township, school district, or other public corporation shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help, support, or sustain any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination whatever . . .²⁴

²² 245 Ill. 334 (1910).

²³ Constitution of Illinois, Article 2, Section 3.

²⁴ *Ibid.*, Article 8, Section 3.

The court held that the reading of the Bible in the public schools, the singing of hymns, and the repeating of the Lord's Prayer in concert, during which time the pupils were required to rise, bow their heads, and fold their hands, constitutes worship within the meaning of the constitution. The court pointed out that under the constitution of the state of Illinois the state cannot be a teacher of religion. The public school is supported by taxes which everyone is compelled to pay regardless of religious or nonreligious affiliations. "The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school."²⁵

Louisiana.—In the case of *Herold v. Parish Board of School Directors*,²⁶ the plaintiffs, Herold and others, were Jewish and Catholic school patrons. The board had passed a resolution requiring the principals and teachers to open the daily sessions of the public schools with readings from the Bible, without note or comment, and, when the teacher was willing, with the repeating of the Lord's Prayer.

By unanimous vote the court held that the reading of the Bible, either the Old or New Testament in the King James version, was not a discrimination against Catholics but was an invasion of the rights of conscience of the Jews. Hence the court disallowed the enforcement of the resolution.

Here the court recognized the difference between what it termed the "Rabbinical Bible" and the "Christian Bible." The court did not concern itself with the differences, or alleged errors, in the different translations of the Christian Bible, which it termed the "Bibles of the Christians," but concluded that the Jews would have their consciences violated by the reading of such a Bible or the offering of the Lord's Prayer. The practice was held unconstitutional in view of the following constitutional provisions:

²⁵ *People v. Board of Education*, 245 Ill. 334 (1910).

²⁶ 136 La. 1034; 68 So. 116 (1915).

Every person has the natural right to worship God according to the dictates of his own conscience . . .

No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion . . .²⁷

Nebraska.—Miss Edith Beecher, a teacher in the public schools of Beatrice, in Gage County, Nebraska, obtained permission from the school board to have religious exercises in her school during school hours, consisting of readings from the Bible, the singing of hymns, and the offering of prayer according to the doctrines and beliefs of sectarian churches. An order was sought to prohibit these religious exercises. The court held that the exercises as conducted by the teacher constituted sectarian instruction as well as compulsory attendance at religious exercises contrary to the constitution. No decision was rendered as to whether or not the reading of the Bible without comment would be permissible.²⁸

The Nebraska court quoted Judge Taft of the Superior Court of Ohio in the case of *Board of Education v. Minor*, in which he said:

The singing of Protestant hymns may be used to communicate dogmatic instruction as effectually as the Bible itself. I cannot doubt, therefore, that the use of the Bible, with the appropriate singing provided for by the old rule, and as practiced under it, was and is sectarian.

²⁷ Constitution of Louisiana, Article 1, Section 4; Article 4, Section 8.

²⁸ *State v. Scheve*, Nebr. 853, 91 N. W. 846 (1902). The court very definitely pointed out that it was not passing on the legality or wisdom of Bible reading in the public schools, saying, "Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities to determine; but whether the practice of Bible reading has taken the form of sectarian instruction in a particular case is a question for the courts to determine upon evidence." In the eyes of the court, the practice here complained of constituted sectarian instruction and it was on this basis that the practice was prohibited, but it leaves the matter of Bible reading, presumably if it can be done without sectarian influence, to the school authorities. It is on this basis that the matter of Bible reading is left optional with the school board or teacher. The State Department of Public Instruction for Nebraska has no record of Bible reading in its schools though it is presumed that very few schools carry on the practice in the state. Reply to questionnaire of November 1, 1932, by the state superintendent of education.

The court took the position that the suggestion that it is the duty of the government to teach religion has no basis whatever in the constitution or laws of the state of Nebraska nor in the history of her people. The duty of the state with respect to religion is to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.

Washington.—The constitution of the state of Washington stipulates that

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.²⁹

These provisions have been interpreted by the attorney-general as prohibiting religious instruction in the public schools, the opening of school with prayer, or the stated reading of the Bible in the public schools.³⁰ As a result of these opinions Bible reading is prohibited in the public schools of Washington and the state superintendent of public instruction reports that the Bible is not read in any of the public schools of the state.³¹ The constitutionality of Bible reading was raised also in the case of *Dearle v. Frazier*³² and again in the case of *Clithero v. Showalter*.³³ Mr. Clithero and thirty-six others presented a petition to the State Board of Education to make daily Bible reading and twice-a-week instruction in the Bible compulsory in the public schools. The board refused the petition and returned it to the petitioners on the ground "that they had no jurisdiction nor authority to make a decision of any kind upon the petition because it raised a constitutional question." The petitioners thereupon filed a

²⁹ Constitution of Washington, Article 9, Section 4; Article 1, Section 11.

³⁰ Opinions of the Attorney-General, 1915-16, p. 254; Opinions of the Attorney-General, 1909-10, p. 135; Opinions of the Attorney-General, 1891-92, p. 142.

³¹ In reply to questionnaire of November 4, 1932.

³² 102 Wash. 369 (1918).

³³ *Clithero v. Showalter*, 159 Wash. 519, 293 Pac. 1000 (1930).

suit in the Supreme Court of the state of Washington asking a writ of mandamus to compel the superintendent and the Board of Education to grant the relief sought in the petition. The Supreme Court held that Article 1, Section 11, of the state constitution ("No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment") prohibits the reading or teaching of the Bible in the public schools and that everything demanded in this suit had been denied in *Dearle v. Frazier*, and that that decision could not be reviewed or overruled. Upon its appeal to the Supreme Court of the United States the case was dismissed on the grounds that there was not a substantial federal question involved.⁸⁴

Wisconsin.—In a Wisconsin case, *Weiss v. District Board*,⁸⁵ Weiss and others, who were Catholic school patrons, came to the court seeking a writ of mandamus to prevent the reading of the Bible in the public school of District No. 8 in the city of Edgerton. The Bible appeared on the list of textbooks for the school. The King James version was used. Portions were selected and read by the teacher, though no comments were made on the reading and children were not required to attend such reading.

The Wisconsin statute provides:

But no textbooks shall be permitted in any free public schools which would have a tendency to inculcate sectarian ideas.⁸⁶

The court held not only that the Bible was a sectarian book but also that its reading was sectarian instruction within the meaning of the state constitution, which reads:

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all

⁸⁴ Transcript of Record, Supreme Court of the United States, *State of Washington ex rel. George Clithero and Thirty-Six Others, v. N. D. Showalter, etc., et al.*, No. 80, October Term, 1931, pp. 11, 87.

⁸⁵ 76 Wis. 177, 44 N. W. 967 (1890).

⁸⁶ Wisconsin Laws, 1883, Chapter 251, Section 3.

children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.³⁷

It held that such reading constituted an interference with the rights of conscience of pupils and that it constituted appropriation of public moneys for the benefit of a religious school, prohibited by the constitutional provision:

The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.³⁸

The order for mandamus was granted, prohibiting the reading of the Bible.

The court declared that sectarian instruction as designated in the constitution manifestly refers to instruction in religious doctrines or dogmas which are believed by some religious sects and rejected by others; that religion, which the court defined as a system of belief, cannot be taught without offense to those who have their own peculiar views of religion any more than it can be taught without offense to the different sects of religion.

It will be noted that in this case the court prohibited the reading of the Bible even though such reading was without comment, that students might be excused during such reading, and that no other exercise, such as singing of religious hymns or offering of the Lord's Prayer, took place. The court held that reading from the Bible in the schools, although unaccompanied by any comment on the part of the teacher, is "instruction." It did not, however, banish from the district school textbooks which are founded upon the funda-

³⁷ Constitution of Wisconsin, Article 10, Section 3.

³⁸ *Ibid.*, Article 1, Section 18.

mental teachings of the Bible or which contain extracts therefrom. It pointed out that such teachings and extracts pervade and ornament our secular literature, that such textbooks are in the schools for secular instruction, and that the constitutional prohibition on sectarian instruction is not intended to include them. The court contended that even though students were permitted to be excused during such reading, the practice tended to destroy the equality of the pupils which the constitution seeks to establish and protect, and put a portion of them to serious disadvantage with respect to the others.

CHAPTER VI

SUMMARY OF BIBLE READING IN THE SCHOOLS

I. DIVERSITY OF OPINIONS

THE MOVEMENT to require the reading of the Bible in the public schools is described by the American Civil Liberties Union in the following words:

Even more successful than the attempt to impose "Genesis as a state religion" has been the movement to compel by legislation the reading of the Bible in the public schools. In practical effect this is equivalent to attempting to impose the Protestant religion on the children of the schools, for the King James version is almost invariably the Bible selected. Any Bible reading in the schools was once generally held to be contrary to the provision for complete separation of church and state.

The movement did not spread until after the war, and developed under the influence of the Klan and the Fundamentalists . . .

Speaking of the states in which Bible reading is compulsory, it goes on to say:

Most of the laws require that the Bible shall be read every school day; some specify the amount to be read. Many contain stringent provisions for their enforcement. From teacher up to superintendent, school officials are required to certify each month that the law is being obeyed. Violation is punishable by loss of salary, revocation of license, fine, or imprisonment.¹

Among the questions that have had their origin in the somewhat familiar practice of conducting morning exercises in the public schools by reading from the Bible, offering prayer, and singing hymns, are these: Does the reading of

¹ *The Gag on Teaching* (New York, 1931), p. 8, published by the American Civil Liberties Union.

the Bible make the public school a place of worship? Does such reading cause taxpayers to support a place of worship? Does the reading of the Bible constitute religious instruction? Is it a religious service? Is the Bible a sectarian book? Does compulsory reading of the Bible in the public schools constitute a violation of religious liberty within the meaning of the usual constitutional and statutory inhibitions?

These and other perplexing questions of a similar nature have frequently been raised with the result of arousing a great deal of anxiety among a considerable portion of the population of our country, who disapprove of this practice of requiring Bible reading in the public schools and have deemed the question of sufficient importance to manifest their disapproval by calling upon the courts to invoke whatever constitutional and statutory provisions might prevent such practice.

The United States constitution does not give the federal government jurisdiction over the question of Bible reading and religious exercises in the public schools. Should the federal government assume such jurisdiction, authority would have to come from the fourteenth amendment. Thus far the question of Bible reading and religious instruction in the public schools has been left to be determined by the individual states, the federal Supreme Court having refused to consider it on the ground that it is not a federal issue.

In some states the reading of the Bible is required in the public schools; in others it is specifically permitted; in some it is optional; in others the laws are silent on the subject and no court decisions have been rendered; and in still others it is prohibited by statutes, by court decisions, or by both statutes and court decisions. In some states, such as Maine, Minnesota, Nebraska, and Ohio, where the laws are silent on the subject of Bible reading in the public schools, it is a matter to be determined by the discretionary powers resting in the school authorities. The courts will interfere with the exercise of such power only where its abuse is clearly

shown.² Such decisions have generally been considered favorable to Bible reading in that they leave the power of permitting or rejecting Bible reading in the schools with the school authorities.

The validity of Bible reading and religious exercises in the public schools must be considered from the viewpoint of the historical background, the constitutional and statutory provisions, and the court decisions of the individual states. Every pupil has the right to enjoy the opportunities offered in the public schools without an infringement of the freedom of worship and liberty of conscience, and the "majority rule" does not apply in matters affecting religion and the rights of conscience as it does in political matters affecting the state.

The constitutional and statutory provisions of the several states are generally in agreement that public money cannot be used for sectarian or religious purposes, that no sectarian books or instruction may be permitted in the public schools, and that the right to worship God according to the dictates of conscience shall never be infringed. But whether the reading of the Bible in the public schools constitutes a violation of these provisions is a question on which there is no unanimity of opinion.³

From a strictly legal point of view the question may be deemed by some to have been settled, for, as we have seen, in the majority of the decisions in which the question has been raised, it has been decided that the mere reading of the Bible in the King James version does not constitute sectarian instruction nor interfere with religious liberty. Nevertheless, the question is still of interest and importance, for there are numerous authorities who disagree with this view, as well as strong dissenting opinions which are worthy of considera-

² *Donahoe v. Richards*, 38 Me. 376 (1854); *Kaplan v. Independent School District of Virginia*, 214 N. W. 18 (1927); *State v. Scheve*, 65 Nebr. 853, 91 N. W. 846 (1902); *Board of Cincinnati v. Minor*, 23 Ohio St. 211 (1872).

³ See *Virginia Law Review*, 16:509-10; also Reports of the American Bar Association, 1928, 53:230, 231.

tion; some of the decisions that have been rendered definitely declare the reading of the Bible in the public schools to come within the prohibitions of the constitution.

II. COURT DECISIONS UPHOLDING BIBLE READING

Earliest cases.—The constitutionality of Bible reading in the public schools does not appear to have been raised during the first three-quarters of a century of our national existence. The question was first brought to the attention of the courts in the state of Maine in the case of *Donahoe v. Richards* in 1854.⁴ This was a suit brought by Donahoe against Richards, the superintendent of the school committee, for expelling his daughter because she failed to comply with the request of her instructor requiring her to read the Protestant version of the Bible.

The next case was brought to the Massachusetts court in 1866.⁵ The plaintiff had refused to ask that his child be excused from bowing the head and standing in a reverential posture during the morning exercises, which consisted of reading from the Bible and of prayer, during which the pupils were required to bow their heads unless their parents had requested that they be excused.

Later cases.—Following the lead of the Maine and Massachusetts courts, the Iowa court took action on this question in 1884, Pennsylvania in 1889, Michigan in 1898, Kansas in 1904, Kentucky in 1905, Texas in 1908, Georgia in 1922, Colorado in 1927, and Minnesota in 1927.⁶ The court decisions in all of these cases may be said to sanction the

⁴ 38 Me. 376.

⁵ *Spiller v. Inhabitants of Woburn*, 94 Mass. 127.

⁶ *Moore v. Monroe*, 64 Ia. 367; *Stevenson v. Hanyon*, 7 Pa. Dist. Rep. 585; *Curran v. White*, 22 Pa. Co. Ct. Rep. 201 (1899); *Pfeiffer v. Board of Education*, 118 Mich. 560; *Billard v. Board of Education*, 69 Kans. 53; *Hackett v. Brooksville Graded School District*, 120 Ky. 608; *Church v. Bullock*, 104 Texas 1; *Wilkerson v. City of Rome*, 652 Ga. 762; *People ex rel. Vollmar v. Stanley*, 81 Colo. 276; *Kaplan v. Independent School District of Virginia*, 171 Minn. 142. In the Pennsylvania case the court said that a mandamus is not an appropriate mode of compelling school directors to prevent the teachers from reading the Bible.

reading of the Bible in the public schools. However, the reading must be without comment and, except in Maine,⁷ pupils may be excused from such exercises upon the request of their parents or guardians.

In no state where there is a statute either permitting or requiring Bible reading has the statute been declared unconstitutional. No court, however, has gone beyond permitting what has been termed "a kind of lip service to the Christian religion," namely, that of bare reading, singing, and prayer.⁸ In every case, except perhaps in Maine, reading has been permitted only if it is without comment, and dissenting pupils must be excused.

Massachusetts.—In the Massachusetts case,⁹ in which the court held that the committee of the town might lawfully pass an order requiring schools to be opened each morning by reading from the Bible and with prayer, and that during the prayer each pupil should bow his head unless his parents specifically requested that he be excused from doing so, the court said:

We do not mean to say that it would be competent for a school committee to pass an order or regulation requiring pupils to conform to any religious rite or observance, or to go through with any religious forms or ceremonies which were inconsistent with or contrary to their religious convictions or conscientious scruples. Such a requisition would be a violation of the spirit of the clause in the constitution, Part 1, Article 2, which provides that no one shall be hurt or molested in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; and it would also be inconsistent

⁷ It should be noted that in the Maine case (*Donahoe v. Richards, supra*) this was not only the first case to come to the attention of the Supreme Court of any state, but the real question here was reading the Bible as a textbook and not that of religious worship. However, the Maine statute requires daily "readings from the Scriptures with special emphasis upon the Ten Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount, and the Lord's Prayer . . . each student shall give respectful attention but shall be free in his own forms of worship." Revised Statutes of the State of Maine, Chapter 19, Section 125.

⁸ For wearing of religious garb see Chapter XIII.

⁹ *Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866).

with the plain intention of the legislature in providing that no one shall be excluded from a public school on account of religious opinions . . .

Colorado.—The district school board required as a part of the morning exercise in each classroom the reading of certain portions of the King James version of the Bible. The reading was without comment. The children were not permitted to leave the room during such reading. It was contended that attendance should be required during such reading on the ground that the Bible is essential to good citizenship.

While the court admitted that there is much in the Bible that is essential to good citizenship, it contended that most of the essential principles can be taught in some other way than by reading from the King James version of the Bible. It took the position that the book itself was not so essential to good citizenship that parents might not exclude it from the instruction of their children; hence children might not be required against the will of their parents or guardians to attend its reading. When the attendance of the children is optional, the reading of the Bible without comment is permissible in the public schools of Colorado.¹⁰

Kentucky.—The Supreme Court pointed out that the fact that one or more denominations accept a particular edition of the Bible as authentic or inspired does not make it a sectarian book. "It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character."¹¹

While some courts have approved what has been termed "general religion" or "natural religion," declaring Christianity to be the common law of the land, no court has attempted to mark out a clear line of distinction between religious and sectarian instruction, or to distinguish between Bible reading as religious worship and as secular study.

¹⁰ *People v. Stanley*, 81 Colo. 276, 255 Pac. 610 (1927).

¹¹ *Hackett v. Brooksville Graded School District* (1905), *supra*, p. 79.

To sum up, Colorado and Kentucky have declared in their courts and North Dakota by statute that the Bible is not sectarian, and the courts of Colorado, Georgia, Kentucky, Minnesota, and Texas¹² have held that the reading of the Bible does not make the school a place of worship, does not require taxpayers to support a place of worship, and does not infringe upon the rights of religious liberty.

III. COURT DECISIONS AND OPINIONS AGAINST BIBLE READING

The courts of other states, however, have taken the opposite view and have asserted that the Bible is a sectarian book and that the mere reading of it constitutes religious instruction or services, violates religious liberty, and makes the taxpayers support a place of worship.

Wisconsin.—By the unanimous decision of its court in 1890, Wisconsin was the first state to hold that the reading of the Bible, though unaccompanied by any comment, has a tendency to inculcate sectarian ideas, is sectarian instruction, constitutes an interference with the rights of conscience of pupils, and involves the appropriation of public money for the benefit of religious schools within the meaning and intention of the constitution and the statutes of Wisconsin.¹³ Her court held that reading of the Bible in the schoolroom may be called "worship" within the meaning of her constitution. If then such an act is worship, the schoolroom has become a place of worship. Even though the pupils were not compelled to remain in the schoolroom while the Bible was being read, the court held that the practice of excusing some tends to destroy the equality of pupils which the constitution seeks to establish and protect.

Said the court:

¹² Compiled Laws of North Dakota, 1913, Section 1388; *People v. Stanley*, *supra*, p. 81; *Wilkerson v. City of Rome* (1921), *supra*, p. 79; *Hackett v. Brooksville Graded School District*, *supra*, p. 79; *Kaplan v. Independent School District of Virginia* (1927), *supra*, p. 79; *Church v. Bullock* (1908), *supra*, p. 79.

¹³ *Weiss v. District Board*, 76 Wis. 177, 44 N. W. 967.

When we remember that wise and good men have struggled and agonized through the centuries to find the correct interpretation of the Scriptures, employing to that end all the resources of great intellectual power, profound scholarship, and exalted spiritual attainment, and yet with such widely divergent results; and, further, that the relators conscientiously believe that their church furnishes them means, and the only means, of correct and infallible interpretation—we can scarcely say their conscientious scruples against the reading of any version of the Bible to their children, unaccompanied by such interpretation, are entitled to no consideration.

An important principle was enunciated by the court when it said: "Religion needs no support from the state. It is stronger and much purer without it." This case "brings before the courts a case of the plausible, insidious, and apparently innocent entrance of religion into our civil affairs . . ."

The court pointed out that prohibiting the reading of the Bible in the public schools is not a denial of the value of the Holy Scriptures, nor is it a blow to their influence upon the conduct and conscience of men, nor disastrous to the cause of religion. "We most emphatically reject these views. The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle."

Though prohibiting the reading of the Bible, Wisconsin does not bar the use of books that may include extracts from the Bible or that are founded on the fundamental teachings of the Bible. Such textbooks are in the schools for secular instruction and are not regarded as coming within the constitutional prohibition of sectarian instruction in the public schools.

Nebraska.—The courts in this state held that school exercises consisting of readings from the Bible, singing of hymns, and offering of prayer as conducted by the teacher in the case involved constituted sectarian instruction and

worship.¹⁴ This decision does not, however, "go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction." It was held here that the "teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist."

Ohio.—The court of this state proclaimed an important truth when it said:

Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated, the better it is for both.¹⁵

Judge Taft of the Superior Court of Ohio said, "The singing of Protestant hymns may be used to communicate dogmatic instruction as effectually as the Bible itself."¹⁶

Illinois.—The Supreme Court of Illinois said that the reading of the Bible in the public schools constitutes worship within the meaning of the constitution:

The wrong arises, not out of the particular version of the Bible or form of prayer used, whether that found in the Douay or the King James version, or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship.¹⁷

Louisiana.—In the case of *Herold v. Parish Board*,¹⁸ decided in 1915, the court prohibited the reading of the Bible, including the Old and the New Testament, upon the ground

¹⁴ *State v. Scheve*, 65 Nebr. 853, 91 N. W. (1902).

¹⁵ Justice Welch in *Board of Education of Cincinnati v. Minor*, 23 Ohio St. 211.

¹⁶ *Board of Education of Cincinnati v. Minor*, in *nisi prius*, quoted by the court in *State v. Scheve*, *supra*.

¹⁷ *People v. Board of Education*, 245 Ill. 334 (1910).

¹⁸ 68 So. 116.

that such practice favored the Christians and discriminated against the Jews. The court said that the Catholics believe in all the Bible, and that it would not concern itself "with the differences, or alleged errors, in the different translations of the Christian Bible . . ."

Louisiana and Colorado cases compared.—It is interesting to note that in the Colorado case the court said:

It is urged that to absent themselves for a religious reason "subjects the pupils to a religious stigma and places them at a disadvantage." We cannot agree to that. The shoe is on the other foot. We have known many boys to be ridiculed for complying with religious regulations, but never one for neglecting them or absenting himself from them.¹⁹

The attitude of the Louisiana court toward the provision for the exemption of certain students from the religious exercises in public schools is interesting when compared with that of Colorado in the same matter. The Louisiana court said:

And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma . . .

In the Colorado case it is assumed that those who are excused during the readings will ridicule those who remain; in the Louisiana case that those who remain will ridicule those who are excused. These may be taken as examples of the reasoning of different judges in which the conclusions reached are opposite. The facts in this disagreement, however, are that both conclusions reached are correct. Either one results in discrimination and consequently in oppression and ridicule. Hence circumstances which give rise to such experiences should be removed as far as possible.

California.—The California court set up certain stand-

¹⁹ People ex rel. Vollmar v. Stanley, *supra*, p. 81.

ards by which to determine whether or not a book is sectarian:²⁰ it is the character of the book that determines whether or not it is sectarian, not the authorship nor the approval or disapproval of a sect; to be sectarian a book must teach the peculiar doctrines of a sect as such, and the fact that it is comprehensive enough to include even a number of sects does not make it sectarian; the fact that the author of a religious book belongs to a particular church does not necessarily make his book sectarian, nor is the fact that the King James version of the Bible is commonly used by the Protestant churches and not by the Catholics a test of whether or not the book is sectarian.²¹ In view of these standards California, while not permitting the reading of the Bible in the public schools, has declared that the Bible is not a sectarian book within the meaning of her constitution and permits it to be in her school libraries.

Minnesota.—In the recent Minnesota case of *Kaplan v. Independent School District of Virginia*,²² previously referred to, in which the majority opinion upheld Bible reading in the public schools of Minnesota, is a very able discussion of the subject in the dissenting opinion given by Chief Justice Wilson. His dissenting opinion seems to be based on the broad general principle that the constitution guarantees religious freedom in the proper meaning of that term.

Chief Justice Wilson said:

I agree that the reading of the Bible in the schools does not require a taxpayer to "support any place of worship."

The constitution not only says that every man may "worship God according to the dictates of his own conscience" but it says

²⁰ *Evans v. Selma Union High School District of Fresno County*, 222 Pac. 801, 31 A. L. R. 1121 (1924).

²¹ In California a district school board required dancing as a part of the curriculum. Pupils were expelled for refusing to dance. It was held that such a requirement was a violation of the rights of liberty of conscience and religious freedom, that it did not matter whether the children or parents were members of some church or not, and that the children could not be expelled for refusing to dance. *Hardwick v. Fruitridge School District*, 205 Pac. 49 (1921).

²² 171 Minn. 142 (1927).

"nor shall any control of or interference with the rights of conscience be permitted."

"Rights of conscience" means what? By conscience we mean that internal conviction or self-knowledge that tells us that a thing is right or wrong. It is the faculty or power within us which decides on the right or wrong of an act and approves or condemns. It is our moral sense which dictates to us right or wrong. Each person is governed by his own views. The "rights of conscience," in religious matters, means the privilege of resting in peace or contentment according to one's own judgment. It is a recognition of a right to religious complacency.

To require the Jewish children to read the New Testament which extols Christ as the Messiah is to tell them that their religious teachings at home are untrue.

The Catholic people do not believe it right to have a Bible read to their children in the absence of the light of construction placed thereon by their church. Are these people to be content to have a Bible read which substantially ignores the doctrine of purgatory, which is one of their vital beliefs? On the contrary, may a Catholic school board have the Catholic version of the Bible read disclosing the theory of purgatory as indicated in the Book of Maccabees and not interfere with the "rights of conscience" of Protestants?

No man must feel that his religion is tolerated. His constitutional "rights of conscience" should be indefeasible and beyond the control or interference of men. The constitution says so.

No decision pro or con has thoroughly considered the construction of the specific language, "nor shall any control of or interference with the rights of conscience be permitted." We have an opportunity here to construe this language. The majority opinion has ignored it. It should be construed in accordance with the best interests of the people. This permits but one conclusion.

Though the majority opinion upheld the reading of the Bible, explicitly stating that they did not wish to express an opinion as to the wisdom of the practice of reading extracts from the Bible, but would leave that to the local school board, there seemed to prevail a feeling that the practice is

a needless cause of friction and dissension in the school district.

South Dakota.—Our most recent outstanding case on Bible reading in the public schools is the case of *State ex rel. Finger v. Weedman*²⁸ decided by the Supreme Court of South Dakota in 1929. Aside from the general reasoning of the court, the South Dakota case is unique in view of the fact that there exists on her books a statute specifically permitting the reading of the Bible within the public schools of the state, such reading to be without sectarian comment. The whole tenor of the case is adverse to Bible reading, although the court had been called upon only to compel the school to readmit certain Catholic children without apology to the school and thereafter to permit them to absent themselves during the reading of the King James version of the Bible.

The case points out that the Bible occupies a special place in the hearts and minds of men; consequently it will be revered for its religious meaning. The reading of it during the morning exercises is not done for a secular purpose, but, as was found by the trial court, for the purpose of "increasing, improving, and inculcating morality, patriotism, reverence, and the developing of religious and Christian characters of the pupils." Its use was not merely as a code of morals or a book of history.

The court further said:

It may be argued that the peace and safety of the state is enhanced by the teaching of our youth morality, reverence, and wholesome religious beliefs. Speaking for myself, I think it is; but it does not follow that a reading of the King James version of the Bible in our public schools is essential to such teaching. Respondents frankly concede that the reading of any version would accomplish the same purpose. The difficulty in reading any version in the public schools seems to be in agreeing upon the version to be read and the person to read it. But it is not neces-

²⁸ 226 N. W. 348.

sary, for the teaching of religion to the youth, that it be taught in the public schools. We have many churches whose function it is to teach religion. The teaching of that particular subject in public schools seems to be so fraught with difficulties and dissensions that it is not practical to undertake it.

The King James version is a translation by scholars of the Anglican church bitterly opposed to the Catholics, apparent in the dedication of the translation, where the Pope is referred to as "that man of sin," and in which the translators express themselves as expecting to be "traded by Popish persons" who will malign them, because such persons desire to keep the people in "ignorance and darkness." We are satisfied that neither the evidence nor reason will justify us in sustaining the trial court's finding that the differences in the two versions of the Bible for a religious purpose are not substantial. History of the conflicts between Catholics and Protestants over those very differences refute such conclusion. It makes no difference what our personal views may be as to the importance of the controversial words. As officers of the state, speaking for the state, neither we nor the teachers of the public schools can say that one side is right and the other wrong. We must leave that to the conscience of those involved.

The court pointed out that the reading of the Bible and the offering of prayer "is devotional, a form of religious instruction, and not a part of the secular work of the school." It contended that if one should read the Bible only for moral or patriotic instruction, comment would be necessary. But it is read as an act of devotion and worship. Otherwise such exercises would be useless. Further, it said:

In countries where the dominant sect can control religion through the power of the state, oppression results. This state has by its constitution said the power of the state shall not be so used. It is our duty to uphold that constitution. It is essential to religious liberty that one be free to worship according to the dictates of his own conscience, and not only that, but to live and teach his religion. That right cannot be taken away by the state, and it follows that such teaching must belong exclusively to the individual and voluntary organizations of such individuals. The

state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions, and the parents' liberty of conscience is the controlling factor, and not that of the pupil.

IV. REVIEW OF CHURCH-STATE RELATIONSHIPS

The evidence shows clearly that the trend of court decisions is to preserve with greater security religious freedom and to free the school curricula from religious control and sectarian influence—this in spite of the fact that there has been a strong movement on foot to require the reading of the Bible and other religious exercises in the public schools.

When the public school refuses to teach religion, it invades the rights of no one. It does not reject religion nor does it foster it. It simply leaves the subject entirely alone and justifies its own existence and support by general taxation on the grounds that it makes no reference to religion. Religious instruction in the public schools, whether it consist of reading the Bible, singing hymns, or offering prayer, is, in respect to the taxpayer, a coerced support of religion. Such instruction, especially if it is compulsory, is incompatible with the principles of religious liberty and freedom of conscience.

This question of the propagation of religion by the state is by no means a new one in American history. The founders of our republic were frequently called upon to deal with it. It came up in Virginia when we declared our independence. The Episcopal church had been the established church in that colony. The Presbytery of Hanover, as soon as independence had been declared, presented a memorial to the general assembly of the commonwealth of Virginia asking for the abolition of the establishment, which had involved, among other things, the payment of state funds to Episcopal clergy. The memorialists said:

In this enlightened age, and in a land where all of every denomination are united in most strenuous efforts to be free, we

hope and expect our representatives will cheerfully concur in removing every species of religious as well as civil bondage. Certain it is, that every argument for civil liberty gains additional strength when applied in the concerns of religion; and there is no argument in favor of establishing the Christian religion but what may be pleaded with equal propriety for establishing the tenets of Mahomet by those who believe in the Alkoran; or if this be not true, it is at least impossible for the magistrate to adjudge the right of preference among the various sects that profess the Christian faith, without erecting a chair of infallibility, which would lead us back to the church of Rome.²⁴

The memorialists further pointed out what they deemed the proper function of government and declared that they were desirous of no state aid in religious affairs:

We would also humbly represent that the only proper objects of civil government are the happiness and protection of men in their present state of existence, the security of the life, liberty, and the property of the citizens, and to restrain the vicious and to encourage the virtuous, by wholesome laws equally extending to every individual; but that the duty which we owe to our Creator, and the manner of discharging it, can only be directed by reason or conviction, and is nowhere cognizable but at the tribunal of the Universal Judge.

Therefore we ask no ecclesiastical establishment for ourselves, neither can we approve of them and grant it to others: this, indeed, would be giving exclusive or separate emoluments or privileges to one set (or sect) of men, without any special public services, to the common reproach or injury of every other denomination. And, for the reasons recited, we are induced earnestly to entreat that all laws now in force in this commonwealth which countenance religious domination may be speedily repealed—that all of every religious sect may be protected in the full exercise of their several modes of worship, and exempted from all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice or voluntary obligation.

²⁴ This petition was presented on October 24, 1776. Several other petitions were presented by the Presbyterians in subsequent years. William Addison Blakely, *American State Papers Bearing on Sunday Legislation* (Washington, 1911), p. 92ff.

This being done, all partial and invidious distinctions will be abolished, to the great honor and interest of the state, and every one be left to stand or fall according to merit, which can never be the case so long as any one denomination is established in preference to others.²⁵

The Baptists and Quakers joined the Presbyterians in opposing the establishment of the Episcopal church, with the result that the latter was disestablished. A motion was put before the assembly, however, to levy a tax for the support of not only the Episcopalian but all denominations. Though the proposed measure was defeated in 1779, it appeared again in 1784 in the form of "a bill establishing a provision for teachers of 'he Christian religion." This bill allowed every person to pay his money to his own denomination, or if he did not wish to help support any denomination, his money would go for maintenance of a school in the county.²⁶

In general the bill was very liberal. The objection to it, however, was that it gave the Christian religion a preference over other beliefs, and hence was opposed to real equality. It was on this basis that Madison declared the bill to be "chiefly obnoxious on account of its dishonorable principle and dangerous tendency."²⁷ The bill was championed by Patrick Henry.

Madison succeeded in having the vote on the measure postponed and immediately wrote and circulated his famous pamphlet, *A Memorial and Remonstrance*, in which, among other objections to the bill, he made the following statement, which is as applicable today as it was then, however innocent the intrusion of religion into matters pertaining to the state may seem to be:

It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

²⁵ Blakely, *State Papers*, p. 94.

²⁶ *Ibid.*, p. 119.

²⁷ *The Letters and Other Writings of James Madison* (New York, 1884), 1:130, 131.

The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians, in exclusion of all other sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?*²⁸

Madison's remonstrance aroused such sentiment against the bill that not only was it defeated but there was passed in its stead an "Act for establishing religious freedom," written by Thomas Jefferson, as a declaration of religious independence applicable to all situations growing out of a union of state with religion, or to any project which would involve such union:

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him

²⁸ *Ibid.*, pp. 163, 164. The italics are the author's.

of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind; that our civil rights have no dependence on our religious opinions, more than our opinions in physics or geometry; that, therefore, the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends also to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it; that though¹ indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt actions against peace and good order; and, finally, that truth is great, and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all

men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.²⁹

V. VIEWS OF AMERICAN STATESMEN

Many other American statesmen have expressed their views on the subject of state religion and the reading of the Bible in the public schools. President Grant said:

Let us labor for the security of free thought, free speech, free press, pure morals, unfettered religious sentiments, and equal rights and privileges for all men, irrespective of nationality, color, or religion; . . . leave the matter of religious teaching to the family altar, the church, and the private school, supported entirely by private contribution. Keep church and state forever separate.³⁰

The Honorable Elihu Root said:

I care not how small may be the numbers of a political faith or a religious sect; . . . now, in this twentieth century, with all the light of civilization of our times, after a century and a quarter passed by this great and free people following the footsteps of Washington, Hamilton, Jefferson, and Madison, now with all the peoples of the world following their footsteps in the establishment of constitutional governments, the hand of a single man appealing to that justice which exists independently of all majorities, has a power that we cannot ignore or deny but at the sacrifice of the best and the noblest elements of government.³¹

Senator Borah, in a speech reported in the *Congressional Record*, said:

Back of the rule of the majority is the great principle of equality, the basic, bedrock principle of free government. The difference between the old democracies or republics, which perished, and ours, is that the ancient republics could devise no way by which to shield the rights of the minority.³²

²⁹ This act was passed on December 16, 1785. *The Writings of Thomas Jefferson*, edited by H. A. Washington (New York, 1861), 8:454ff.

³⁰ President Grant in a speech delivered to the G. A. R. veterans at Des Moines, Iowa, in September, 1875, quoted in *The Catholic World*, 22:434, 435 (January, 1876).

³¹ *Congressional Record*, 47:3691 (August 7, 1911).

³² *Ibid.*, p. 3687.

Senator John Sharp Williams expressed his views in these words:

I am not one of those who believe that tyranny is a particle sweeter because it is the tyranny of a majority. I believe, with old Roger Williams, that there are two classes of things in this world—the things of the first table and the things of the second table. The things of the first table are those things which are between God and the individual man, and government has no right to touch them. If 99,999,999 of the people out of 100,000,000 wanted to do anything in connection with them and one man stood up in his right and said "No," then that one man's voice should restrain all the rest. Amongst these things are freedom of religion . . . The people have voluntarily put upon themselves restrictions with reference to that matter. They have never established the Christian religion as the religion of their country. They had the power to do it. They had the power to refuse to restrict themselves from doing it. But they decreed that for all time there should never be among us an establishment of religion. They were wise enough to know that men always, everywhere, have weaknesses.³⁸

The Honorable Philander P. Claxton, United States commissioner of education, when asked to speak before the Pastors' Federation of Washington, D. C., upon the occasion of the launching of a campaign to have religion taught in the public schools of the District of Columbia, expressed his views on the subject as follows:

I have no patience with those who cry that the public schools are godless because they do not specifically impart religious instruction. They are not godless. They are not irreligious. The teachings of the public schools are the greatest force for the advancement of morality in the United States.

In this country we have, and I most earnestly hope we shall continue to have, separation of church and state. It is not the prerogative of the public schools to impart religious teachings under our system of government. I take it for granted that no one here would want what some other countries of past ages have had.

³⁸ *Ibid.*, 49:2276 (January 30, 1913).

Separation of church and state has contributed to the vitality of religion in this country. Since the public schools, supported by the people, are fitting the children of the nation for citizenship, they may use whatever is best to accomplish that secular side of the highest citizenship.

I have found, as a rule, that most public school teachers are not qualified to teach religion. If they were qualified, it would be impossible for them to agree upon the subject. Even the most ardent advocates of compulsory religious education are agreed on one thing, and that is that religious teaching, as it has to do with the things on which we differ, rather than the things on which we unite, should not be given in the public schools. But the difficulty of harmonizing the divergent creeds of all denominations and of nonreligionists is an insurmountable barrier, and there would be little left on which we could agree. . . . I want to say that I firmly believe that the home, the church, general societies, and select schools are as much responsible for the proper education of the child as are the public schools of this nation. Especially is the home, the church, and the Sunday school the place for religious instruction.³⁴

We agree with Mr. Claxton that in the moral training of the youth there is no substitute for the home, the church, and the church school. The church cannot shift its responsibility to the state. The problem of religious education is a challenge not to the state, but to the church. To have recourse to state religion would be to apply a remedy which would only aggravate the trouble it was meant to cure.

While the desire to have the Bible read as a part of the morning exercise in the public school is in many cases a commendable one, it is equally evident that it is a religious motive which prompts the desire.³⁵ If this were not true, why not read the Talmud, the Koran, or Confucius? They also are rich in moral training.

In the words of Madison, "Religion is not within the pur-

³⁴ This speech was delivered on November 27, 1916. Quoted from *Liberty*, Vol. XII, No. 1 (1917).

³⁵ See Frank Swancara, "The Colorado Bible Case," *Lawyer and Banker*, 21:164 (May-June, 1928).

view of human government." The exclusion of Bible reading from the public schools need not bar the Bible from the youth in our land. When we realize the bitter dissensions that have developed between organizations over conflicting theories, we must conclude that education in the field of religion must be left in the hands of churches and individuals.

It is the duty of government to protect but not to favor one religion above another.⁸⁶ Today the public school has become far-reaching in its influence. It is serving a people more divergent in their beliefs and yet a people who in general are more dependent on it for the education of their children than those of any previous time. The public schools are supported by the taxes of Protestants and Catholics alike, Jews and infidels. All are entitled to equal opportunities and privileges. The injection of Bible reading into the public schools immediately sets up a conflict motivated by religious differences. The Catholic objects to the King James version, the Jew objects to the New Testament, the infidel condemns all, and even the Protestants wrangle among themselves over religious interpretations.

These facts may seem of themselves insignificant; still they may warrant the exclusion of Bible reading from the public-maintained schools. It is the one course that may be pursued with absolute safety, with the assurance that no one's rights are being trampled upon and with a knowledge that perfect justice has been done. From the cases that have been noted it appears that the courts are looking in that direction, an attitude which accords more perfectly with public opinion at the present time and which more nearly approximates the complete separation of church and state, the great American principle of government.⁸⁷

⁸⁶ This duty is clearly stated by the Honorable Clarence Manion, professor of law at Notre Dame University, in the South Bend (Indiana) *News-Times* of June 22, 1928.

⁸⁷ Thomas Victor Koykka, "Reading the Bible in the Public Schools," *Michigan Law Review*, 28:430-36 (February, 1930); B. G. Reeder, "Monographs on Religious Freedom," *West Virginia Law Quarterly*, 31:192 (April, 1925).

Our conclusion is pertinently expressed in the words of Benjamin Franklin:

When a religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one.³⁸

³⁸ From a letter written by Franklin to Dr. Price. *The Complete Works of Benjamin Franklin*, edited by John Bigelow (New York, 1888), 7:140.

CHAPTER VII

ORGANIZATIONS ACTIVE IN SPONSORING OR OPPOSING BIBLE READING IN THE SCHOOLS

I. SPONSORING BIBLE READING

SEVERAL organizations are actively sponsoring the reading of the Bible in the public schools.

The National Reform Association.—Headquarters of this organization, an enthusiastic promoter of Bible reading, are in Pittsburgh, Pennsylvania. It was organized in Allegheny, Pennsylvania, in 1864, with John Alexander as its first president. Its object was defined to be

the preservation of the Christian institutions of this country, such as our civil Sabbath; the Bible in the public schools; the securing of a uniform marriage and divorce law, conformed to the law of Christ; the retention of the oath in our courts; chaplains in our army and navy, etc. Also to secure an amendment to the federal constitution that would in suitable terms recognize the authority of Jesus Christ as the Governor of the nation, thus placing the nation in the right relation to God, at the same time affording a legal basis for the Christian institutions of our country.¹

The association seeks to secure its objectives through education and legislation. It has a corps of speakers who discuss these subjects from pulpit and platform and wherever opportunity affords. It holds conventions, both local and national; publishes and distributes leaflets, pamphlets, and books on these subjects; carries on a very active lobby in municipal, state, or federal government, wherever legislation is contemplated, in what is termed "the interests of Christian reforms"; and opposes contrary legislation.

¹ David McAllister, *Christian Civil Government in America, The National Reform Movement, Its History and Principles* (Pittsburgh, 1927), p. 23.

It is financially supported by voluntary contributions from those who believe in its work. Those who contribute five dollars or more a year become members and receive its publication *The Christian Statesman* and other literature. Church organizations frequently make contributions to it. Special gifts and inheritances are also received from friends. An active campaign to raise funds is carried on by the organization.

The association also sponsors what is known as the Woman's Auxiliary to the National Reform Association. This Woman's Auxiliary, through its local auxiliaries, promotes the work of the association. Active membership requires a payment of one dollar; associate, from five dollars to twenty-five dollars; honorary, more than twenty-five dollars.

The constitution of the National Reform Association contains the following pledge:

Perceiving the subtle and persevering attempts which are made to prohibit the reading of the Bible in our public schools, to overthrow our Sabbath laws, to corrupt the family, to abolish the oath, prayer in our national and state legislatures, days of fasting and thanksgiving, and other Christian features of our institutions, and so to divorce the American government from all connection with the Christian religion . . .

Believing that a written constitution ought to contain explicit evidence of the Christian character and purpose of the nation which frames it, and perceiving that the silence of the constitution of the United States in this respect is used as an argument against all that is Christian in the usage and administration of our government;

We, citizens of the United States, do associate ourselves under the following Articles, and pledge ourselves to God and to one another to labor through wise and lawful means, for the ends herein set forth . . .²

The organization claims to be undenominational. It holds that the state belongs to God and that Jesus Christ is civil governor of all the nations. Though it has led various re-

² *Ibid.*, p. 345.

form movements, its principal work for years has been directed toward securing the reading of the Bible and the repeating of the Lord's Prayer in the public schools, and the passage of state and national Sunday laws. In its ardent support of Bible reading in the public schools, its avowed purpose has been to place the Bible in the center of our entire educational system, for, as stated by Mr. R. C. Wylie, "we are not inconsistent, as our critic declares, but we want the whole educational system, from the primary grade up to the state university, constructed on the Christian plan here indicated."³

These principles are clearly set forth by the Special Deliverances, which were drawn up by the Plan of Action Committee and advocated by the conference at large at Winona Lake, Indiana, on July 3, 1923, and which appeared in *The Christian Statesman*, the official organ of the association.⁴ These say:

Humbly recognizing the Lord Jesus Christ as King of kings and Lord of lords, we submit that all civil government is directly responsible to Him; and we pray that the nations, now suffering in their sins, may acknowledge His authority and obey His will that they may be worthy of preservation by His Almighty power . . .

Daniel Webster laid down this dictum: "The right to punish crime involves the duty of teaching morals." This obviously fair principle makes it obligatory on the state to define the system of morals to be taught in the public schools—whether the Christian system or some other—to give a large place in the public school curriculum to instruction in morals, to require that every child shall be carefully instructed in the righteousness of the Ten Commandments and the Sermon on the Mount . . .

Inasmuch as this is a Christian nation adhering to the Christian system of morals, it is the sense of this conference that those authorized to teach in the public schools should be in thorough

³ R. C. Wylie, "The American Public School System," *The Christian Statesman*, September, 1923, p. 5.

⁴ *The Christian Statesman*, September, 1923, pp. 16-18.

sympathy with the ethics of Jesus as taught in the Bible, that in order to qualify as public school teachers they should be required to pass an examination in methods of teaching moral principles, and that normal schools and teacher-training schools should be required to give a full course of instruction in methods of teaching Christian morals to the children coming under instruction in our schools.

Thus the association would not only give a place in the public school curriculum to the reading of the Bible and "require that every child shall be carefully instructed in the righteousness of the Ten Commandments and the Sermon on the Mount," but would even go so far as to require public school teachers to pass an examination "in methods of teaching moral principles," these to be the "ethics of Jesus as taught in the Bible." In addition they would also have the state require normal schools and teacher-training schools to give a "full course of instruction in methods of teaching Christian morals to the children" in the public schools.

The practice in some schools of teaching courses in morals and Americanism without including the Bible and religion is denounced in an article entitled "Present Status of the Bible in Public Schools," by W. S. Fleming of the National Reform Association, who is considered by his associates to rank high as an authority on the Bible in the public schools.⁵ Such compromise measures he considers to be only "feelers after a better way." "The difficulty with all these halfway measures," asserts Mr. Fleming, "is that they are built upon the false secular theory of education, and carefully exclude all religion, any mention of God, Bible, Golden Rule, Ten Commandments, Sermon on the Mount, etc., and are as pagan as the ethics of Plato."

The writer says further:

This article has no reference to the study of the Bible as literature or history, nor to any scheme of cooperation between the schools and the churches by which the Bible and religion are

⁵ *Ibid.*, pp. 22-24.

edging their way and find a valuable though not the proper place in education. The Colorado plan, the South Dakota plan, and the Gary plan, etc., recognize the present lack in education and are feelers after the truth and, as such, worthy of some commendation; but the fatal defect with them all is that they stand upon the foolish secular theory of education and help to keep religion out of its rightful and authoritative place in the schools.

The National Reform Association feels that the only way we can have a successful public school system is by definitely putting religious instruction into the public schools—if necessary revamping our whole educational system to that end; that we must follow the “plan of reading devotionally a few verses every morning in every schoolroom with the Lord’s Prayer repeated in unison by teacher and as many pupils as will join”; and that this “must be done as the least, not the most, the first step, not the last. There is a growing sentiment for a textbook in Christian ethics in the hands of every teacher, to be taught as faithfully as she now teaches mathematics.” The child must gain every day in the schoolroom “the great fundamental facts of religion that all Christians believe and the primary principles of morality that made our civilization and upon which its future rests.”⁶

The association claims to be the “leading proponent in America of the teaching of the Bible in the public schools.” It has frequently issued calls and set aside a particular day on which churches, Sabbath schools, and societies should pray for the Bible in the public schools, proclaiming “the necessity of the Bible in public education and the paramount obligation of our government to place it there.”⁷

In the state of Michigan this organization sponsored the Harnley Bible Bill, which provided for the Bible in the public schools and release-time week-day education. In different sections of the country it formed organizations which have

⁶ *Ibid.*

⁷ Arthur B. Cooper, “Day of Prayer for the Bible in the Schools,” *The Christian Statesman*, September, 1923, p. 31.

as their objective the placing of the book in the public schools.

"Restore the Bible to all our public schools and save America!"⁸ is virtually a slogan of the National Reform Association. They believe that the day of their hopes is dawning.⁹

Moral Culture League.—Such an organization was projected in Arkansas in 1930, known as the Moral Culture League of Arkansas. Under this League, representatives of the National Reform Association led a campaign which resulted in putting the Bible into daily use in the public schools throughout the state.

Bible Fellowship League.—This organization, similar in purpose and procedure to the Moral Culture League, is at the present time campaigning over the state of Washington. Efforts are being made to induce school officials to put the Bible into the schools. A more or less successful effort has been made to influence the Character Building Committee of the National Education Association to make recommendations for and encourage the reading of the Bible in the public schools.

The International Reform Federation.—This is another organization that has encouraged the reading of the Bible in the public schools, though of late it has not been so aggressive along this line as it once was.¹⁰ It was founded by Dr. Wilbur F. Crafts in Washington, D. C., in 1895, under the name of Reform Bureau. This organization resulted from a series of lectures delivered in that year at the Princeton Theological Seminary by Dr. Crafts. These lectures dealt with the general social field in religions, and emphasized the need of reform movements. In 1902 the name was changed to International Reform Bureau, in 1923 to World Prohibition and

⁸ "Save America," *The Christian Statesman*, September, 1929, p. 1.

⁹ A brief by Raymond M. Hudson, of the Washington, D. C., bar, supporting the right to read the Bible in the public schools appears in the *Lawyer and Banker*, September–October and November–December, 1927.

¹⁰ The headquarters of the International Reform Federation are at 206 Pennsylvania Avenue, S. E., Washington, D. C.

Reform Federation, and again in 1924 to its present name, International Reform Federation, Inc.

The organization is supported by voluntary subscriptions, is nondenominational and nonpartisan, and has for its principal objectives civic education, good government, and the exposure of promoted vices. Its principal work has consisted in combating the liquor traffic and the sale of opium. It has had an active part in the passage of measures which bar the sale of opium both in the United States and abroad.

Its membership numbers approximately eighteen thousand people. The Reverend Robert Watson of Boston, Massachusetts, is president, and the Reverend George S. Duncan of Washington, D. C., is secretary. Its official publication is *Twentieth Century Progress*, which for many years was known as *The Twentieth Century Quarterly*.¹¹

The Women's Christian Temperance Union.—This organization originated in an attempt to cope with the wave of drunkenness that spread over the United States after the Civil War.¹² In 1911 it formed a department known as The Bible in the Public Schools, with Mrs. Jean B. Wylie as director. Following the formation of this department, the organization put forth some effort to place the Bible in the public schools, but the work has not been carried on with much enthusiasm. This lack of zeal was due to the divided sentiment with reference to the advisability of such a movement and to the recognized fact that the principal function of the organization is the promotion of the cause of temperance and prohibition. Its participation in the movement for placing the Bible in the public schools has now practically ceased, and its principal efforts are being expended in the interest of temperance.¹³

¹¹ *The New Handbook of the Churches, A Survey of the Churches in Action*, edited by Charles Stelzle (New York, 1930), p. 247; *Standard Encyclopedia of the Alcohol Problem*, edited by Ernest Hurst Cherrington (Westerville, Ohio, 1926), 3:1342.

¹² The W. C. T. U. was organized at Fredonia, New York, December 15, 1873.

¹³ *Standard Encyclopedia of the Alcohol Problem*, 6:2891. See also the *Encyclopedia of Social Reform*, edited by W. D. P. Bliss (New York, 1897), p. 1395.

The A. P. A. (American Protective Association).—In its blossoming days of the nineties this association lent encouragement to Bible reading in the public schools. It was formed on March 13, 1887, at Clinton, Iowa, by Henry F. Bowers, a member of the bar. Following the East Boston riot in 1895 there sprang forth from the A. P. A. an anti-papal organization which took the highly nativist name of the Order of the Little Red School House.¹⁴

The Ku-Klux Klan.—The Klan of the twentieth century, which Maury says was the "fruit of the crossing of Guardians of Liberty, *Menace*, and Knights of Luther with Knights of Columbus and Catholic clerics,"¹⁵ encouraged placing the Bible in the public schools. The order, known as the Invisible Empire, Knights of the Ku-Klux Klan, was organized on Stone Mountain, near Atlanta, Georgia, on Thanksgiving night of the year 1915 by William Joseph Simmons and others. During the first five years of its history it made but little progress, but the period following the Clark-Simmons agreement, entered into in 1920, is noteworthy. The meteoric rise of the Klan is one of the outstanding phenomena of twentieth century sociological history, and needs more explanation than the statement that it had a high-powered and astute propaganda department. Nor can its rapid decline be adequately explained on the ground of internal dissension. For the purposes of our discussion, however, it is sufficient to note its active and militant force in promoting religion in the schools. This organization played an influential part in the religious fight that placed upon the statute books of Oregon her compulsory school law of 1923, which was subsequently declared unconstitutional by the United States Supreme Court.¹⁶

The Lord's Day Alliance of the United States.—The Rev-

¹⁴ *Ibid.*, pp. 48-52.

¹⁵ Reuben Maury, *The Wars of the Godly* (New York, 1928), p. 270.

¹⁶ General Laws of Oregon, 1923, Chapter 1, Section 5259. This act required the attendance at the public schools of all children between the ages of eight and sixteen years. See Chapter XV below.

erend David G. Wylie is president of this religio-political organization and the Reverend Harry L. Bowlby is general secretary. Its avowed purpose is the preservation of the Lord's Day as a day of rest and worship.¹⁷ Through Sunday and other religious legislation penalizing all religious dissenters for their faith, it seeks to propagate its religious dogmas. Through its official organ, the *Lord's Day Leader*, it frequently voices its approval of and lends its support to the movement to require the reading of the Bible in the public schools.

Ministerial associations.—In some places ministerial associations support the movement to have the Bible read in the public schools. In some places they have been instrumental in having school boards pass rulings requiring the daily reading of the Bible in the schoolroom in connection with the morning exercises.¹⁸ Some of these ministerial organizations hold that the churches must enter the political arena in order to promote public morality; that the churches, the clergymen, church members, and church leaders must attempt to make Christ king in law and righteousness, to make Him the foundation of politics and government, to the end that the kingdom of God may be established on earth.

As a result of this theocratic teaching, ministerial associations and other varieties of reform organizations, as auxiliaries to the churches, are frequently formed and directed by ministers of the gospel. They are actively engaged in politics—supporting certain candidates, blacklisting others, lobbying for legislation, and threatening legislators, executives, and even judges if they fail to promote their program. Not infrequently they address their congregations from the pulpit with political harangues instead of gospel sermons, and in various ways use the machinery of the church to promote political measures that they believe will aid or achieve the

¹⁷ Headquarters of the Lord's Day Alliance are at 156 Fifth Avenue, New York City.

¹⁸ See *Kaplan v. Independent School District of Virginia*, 214 N.W. 18 and "Bible Study for New York School Pupils," *Literary Digest*, July 4, 1931, p. 26.

aims of their churches, thus supplanting church functions with political substitutes or attempting to transform political devices into church agencies.

The promoters of these organizations and those who would use political agencies to establish the tenets of the church are so set in their purposes that they are deaf to the testimony of history on the monstrous manifestations that always, sooner or later, attend civil espousal of the church program. In this connection it is significant to note the intolerant and often disdainful spirit shown when these religio-political organizations come into conflict with the dissimilar convictions and inherent rights of Jews, Catholics, and others, whether minorities or not. The organization designed to enforce or indoctrinate Christian morals by police impulsion may seem innocent enough on cursory examination, especially to its protagonists, but essentially its spirit is that of the Inquisition; if given a chance to operate or to grow, it will inevitably produce the terrifying aberrations that always mark usurping zealotry. Politics is the function of the citizen as a citizen, and not the function of a clergyman as a clergyman. Whatever part the individual takes in political affairs, in exercising the franchise, in influencing others in political matters, in the making of laws, in the administering of the civil government, and in executing laws, it should be done in his capacity as a citizen of the state.

The individual chosen to make laws, to administer a public office, or to execute laws should be chosen irrespective of his church affiliations, and should administer his office without religious bias. The state functions only in civil affairs, and consequently concerns itself only with good citizenship. The state should protect the rights of every citizen regardless of his religion, but should not promote any religion. Where clergymen put their congregations in politics in order to promote church interests in the political arena, they are resorting to a dangerous expedient. Clerical politics have always wrought corruption in the church, mischief in the govern-

ment, intolerance toward dissenters, and persecution of non-conformists. The commingling of religion and politics, a violation of the fundamental guarantees of civil and religious liberty as conserved by the fathers of our constitutional government, is also a violation of the essential principles of Christianity.

These zealous reformers are not merely desirous of having the Bible placed in the public schools, nor are they content with having a portion of it read without comment. As they frequently state, the campaign has already become "much broader than the mere reading" of the Bible. It must be studied. Bible courses must be provided as a regular part of the high school curriculum. In some cases, such courses have already been introduced. So-called "Bible textbooks" are being provided. In short, it means that the public schools must take on the teaching of religion.¹⁹

The Christian Statesman of November, 1923, asks these questions: "Should it [the state] not teach the essential facts about God and the future life?" "Should it not teach the decalogue to its youthful citizens?" "Should it not teach the common facts of Christianity?" Such a program would mean the teaching of dogmatic religion in the public schools and universities. It would mean, as we have seen,²⁰ the establishing of chairs of theology in state normal schools and universities, which are supposed to be purely secular institutions.

Such a system has been in existence in European countries. It was the system that prevailed in Germany before the World War. The Kaiser's government had a close alliance with the church, and the idea of *Dient mir und Gott* found expression in state support of the church schools. The common practice in the European countries has been to have state churches.

To combine religious and secular instruction in the tax-

¹⁹ "Weekday Religious Education," *The Christian Statesman*, September, 1929, p. 7.

²⁰ Page 69.

supported institutions of learning in this country looks like a step backward. That denominational schools should teach theology is eminently fitting and proper. An important function of the private church school has been to train men for the ministry and other religious activities. Each denomination naturally teaches the tenets of its belief, but an attempt to introduce so-called "religious instruction" into our public school system would inevitably lead to disagreement over what should and what should not be taught.

That the education of youth for citizenship is a regular governmental function and that the public schools are the instruments of the state for the exercise of that function, cannot be questioned. This does not mean, of course, that the responsibility of education may not be assumed independently by private persons or organizations. The fact is that the particular schools in question are the purely public schools conducted by the government for a public purpose. The experiences of American life—particularly those of the nineteenth century attending the growth of the common school system—have shown that nowhere are the evils of partnership of state and church more accentuated, nowhere must a more scrupulous effort be made to maintain complete separation, than in the realm of the common school. That principle has been embodied in every state constitution. The spirit and operation of such constitutions is that schools supported wholly or in part by public funds shall be free from sectarian control or influence. The common school is to be neutral ground. This principle is well stated in the words of Professor Paul H. Hanus of Harvard University, when he says:

But if it were not impossible, for reasons already set forth, to give explicit and formal instructions in religion in the public schools, it ought not to be given for another reason. As has been already pointed out, there are few divisive influences in human society that cut deeper and entail greater rancor than differences in religious belief. The public school is, and should be, our great-

est unifying influence. It is the function and it is the glory of our public school that it is the most successful instrument yet devised for preparing people of every sect and of no sect, people of every grade, and people of the most diverse nationalities, for progressive citizenship in our American democracy.²¹

The whole history of state teaching of religion, far from proving its efficacy for the salvation of society, leads rather to the conclusion that such a system is destructive of the higher institutions of both church and state.

When we realize how the several denominations, in many cases the members of the same denomination, differ on points of theology, it is quite evident that there could never be agreement upon what is to be taught in the public schools. Moreover, there are many people in the world who subscribe to no creed whatever. They pay taxes the same as others, and they object to having their children taught doctrines in which they do not believe.

Our government is founded upon the principle of separation of church and state. The experience of centuries of ecclesiastical control in European countries warns us against any partnership of government and religion on American soil. Under the policy of separation the United States has grown and prospered, and while some unfortunate tendencies may be observed which have tended to promote discord and strife over religious differences, our public schools and universities have as yet been remarkably unaffected by them.

It has been said that there is danger in turning loose educated men without religion or morals. Those who would provide men with religion by state compulsion logically can sponsor only "established" religion. Such a position would lead us to infer that men who do not concur in established dogmatic beliefs are immoral men. If that is true, we should have to regard Thomas Jefferson, author of the Declaration of Independence, who was a religious nonconformist, as "immoral." We should have to denounce Ralph Waldo

²¹ Paul H. Hanus, *Beginnings in Industrial Education* (New York, 1908), p. 145.

Emerson on a similar count. Galileo was forced by the church of his day to recant his theory that the earth was round and revolved around the sun. Such a theory was considered rank heresy, and there is little doubt that the divines believed that they were doing God a great service when they tried to uproot it. Columbus was classed as a heretic according to the orthodox views of the day and was faced with bitter opposition from the church in his effort to finance his voyage of discovery.

There is sufficient evidence to show that the churches of our country are far better off as free and independent organizations and will prosper far better as free institutions than they would if they were in partnership with or supported by our government. Religious thought will exert a greater influence upon the people in that way than by attempting to make of our public institutions vehicles for the propagation of theological dogmas.

There is no question but that many of these reformers are sincere and mean well, but their energies are being misdirected. The fault is largely, we assume, a failure to see in the history of the past what such attempts have always led to and a failure to interpret aright the American principle of the separation of church and state, a failure to see that this principle applies and must continue to be observed in our public school system if that system is to accomplish the great and ever increasing responsibility that rests upon it.

II. OPPOSED TO BIBLE READING

The movement to place the Bible in the public schools, to require its reading and the religious services that attend such reading, is opposed not only by men who deny the Bible as the infallible Word of God, such as atheists, infidels, free-thinkers, and liberals, or those who deny the divinity of Christ, such as Jews,²² Unitarians, and Universalists, but by

²² The position of the Jews is well stated by Dr. Louis I. Newman, rabbi of Temple Emanu-El, San Francisco, in his pamphlet entitled *The Sectarian Invasion of Our Public Schools* (San Francisco, 1925).

many religious and pious men who believe in the Bible and in Christianity, yet feel that religion may best be fostered by private enterprise under the protection of the state, not by the state, and that religion does not come within the purview of civil government, that the church and state must be separate in practice as well as in theory.

It is likewise opposed by those who have a distinctive program of religious education, that is, by denominations that conduct their own schools, and by those who regardless of denomination promote release-time week-day religious education.

American Civil Liberties Union.—Certain nonreligious organizations are also taking a very definite part in counteracting this movement to place the Bible in the public schools. Among these is the American Civil Liberties Union, with headquarters in New York City.²³ This organization is not only opposing new laws but it is fighting the laws that already require the reading of the Bible in the public schools. According to its own statement, the Union is an incorporated association which fights for free speech, free press, free assemblages wherever those rights are violated in the fields of government, industry, education, and race relations.²⁴ In its declaration defining its position it makes this statement:

The attempts to maintain a uniform orthodox opinion among teachers and to place legal restrictions on teaching should be opposed. So, too, should efforts to establish religion in public schools, as through the compulsory reading of the Bible or the prohibition of the teaching of evolution. The attempts of educational authorities to inject into public school and college instruction propaganda in the interest of any particular theory to the exclusion of others should be opposed.²⁵

*Freethinkers of America.*²⁶—This is another organization actively opposed to such laws. According to its own state-

²³ 100 Fifth Avenue, New York City.

²⁴ *The American Civil Liberties Union, Inc.*, December, 1931, p. 3, published by the American Civil Liberties Union.

²⁵ *Civil Liberties*, No. 9, American Civil Liberties Union (New York, July, 1932).

²⁶ 317 East 34 Street, New York City.

ments it is fighting to maintain the sound American principle of the complete separation of church and state as provided in the constitution.²⁷ It demands "that no religious instruction be given or religious observance be held in schools supported in whole or part by taxation; and that the machinery and organization of the public school system be in no way used to further religious doctrines" and "that all religious services now sustained by the government shall be abolished; and especially that the use of the Bible in the public schools, whether ostensibly as a textbook or avowedly as a book of religious worship, shall be prohibited; that all laws directly or indirectly enforcing the observance of Sunday as the Sabbath shall be repealed."²⁸ It exists for the purpose of combating "every attempt of organized religion to gain control of our public institutions, and for upholding the constitutional principle of the separation of church and state . . ." In the judgment of the Freethinkers:

The greatest danger that America faces today is the organized attempt of the forces of religion to dominate our political and educational system. . . . The Bible is being read in the public schools. Pressure is being brought to bear upon our boards of education to permit religious teaching during school hours. Backed by vast financial resources, supported by ignorant or self-seeking politicians, and playing upon the religious prejudices of many of our citizenry, clericalism is engaged in a mighty campaign to set up a state religion in America and to force its own peculiar tenets down the throats of the American public.²⁹

Religious Liberty Association. — This society, with headquarters in Washington, D. C., has affiliated organizations

²⁷ Among its members and listed as honorary vice-presidents are Harry Elmer Barnes, M. Edouard Herriot, Rupert Hughes, Sir Arthur Keith, Harold J. Laski, Joseph McCabe, Bertrand Russell, Theodore Schroeder, G. Elliot Smith, Clarence Darrow, and other notable persons. Luther Burbank was also a member of the organization.

²⁸ Declaration of Aims and Principles of the Freethinkers of America.

²⁹ *Ibid.* Joseph Lewis, *The Bible and the Public Schools*, published by the Free-thought Press Association (New York, 1931), gives additional information on the work of this organization and on its opposition to the reading of the Bible in the public schools.

throughout the world and publishes *Liberty*, a magazine of religious freedom, of which Charles S. Longacre is editor. The association and its branches believe in the complete separation of church and state. They believe in God and in the Bible as the Word of God. They declare that the Ten Commandments constitute the law of God and that they comprehend man's whole duty to God and man, that the religion of Jesus Christ is founded in the law of love of God and needs no human power to support or enforce it—that love cannot be forced. They believe that civil government is divinely ordained to protect men in the enjoyment of their natural rights and to rule in civil things, that within its own realm it is entitled to the respect and obedience of all, but that it is the right, and should be the privilege, of every individual to worship or not to worship as his own judgment and conscience dictate, provided that in the exercise of this right he respects the equal rights of others. All religious legislation, they insist, tends to unite church and state and is thus subversive of human rights, persecuting in character, and detrimental to the best interests of both church and state.⁸⁰

Other organizations.—The Secular League, with headquarters in Washington, D. C., and the Missouri Synod of Lutherans, with headquarters in St. Louis, Missouri, are opposed to Bible reading in the public schools and to similar religious measures.

In 1925 the Board of Education of Lansing, Michigan, sanctioned a proposed course of religious instruction in the public schools sponsored by the Ministerial Association of that city. The Lutheran ministers of Lansing filed a protest with the Board of Education against the proposed course in religious education for the public schools. In it they declared

⁸⁰ Declaration of Principles, Religious Liberty Association, Washington, D. C. Speaking of the above organization, Mr. B. H. Hartogensis says, "Great public service is rendered by the Religious Liberty Association of Washington, D. C., and similar associations as of Seventh Day Adventists." *Yale Law Journal*, March, 1930, p. 675, note.

that the teaching of religion subverts the purpose of the American public school; that "the American state is secular and all its institutions are secular, the public school included," whereas the introduction of religious education in the public schools makes them sectarian, thus giving them a character they should not assume. They pointed out that the public schools are supported through taxation by Christians, Jews, Mohammedans, and members of other faiths or of no faith. They contended that the introduction of religious education in secular schools by the Board of Education is a "breach of trust." The petition of protest went on to say:

The fact is, the course is there, and that course is offensive to certain groups of people. If the Bible is used—and we assume it is—the course is offensive to all whose faith is not grounded in the Bible, or who have no faith at all. It is offensive to many Christian denominations who believe in the absolute separation of church and state, who hold that the state is, and must be kept, secular in all its institutions. The Bible is a sectarian book, and its use in the public schools changes their character. Would the Board of Education pursue the same course of action if an association of Mohammedans, Chinese, and Persians petitioned for a course of religious education in the public schools, using as a means of instruction their sacred writings?

The objection is then raised: "But no definite religious creed or faith is to be taught. The course is to be nondenominational." Why call it religious education then? Why use the Bible? Can a course in religious education be nondenominational? Who is going to teach it? Is this teacher going to interpret the Bible? If so, how? He is not going to interpret it? But how in the world, then, can a person teach a course in religious education without interpretation?

Someone says, "The Bible should be taught for its moral, historical, and literary value." Who would presume to teach the literature, history, and morality of the Bible without some interpretation? teach the first chapter in the Bible, the fall of Adam and Eve, the deluge, the history of Israel, the prophecies concerning a Messiah, the life, words, miracles, passion, and resurrection

of Jesus Christ, the Ten Commandments, the Psalms, and the Epistles, teach them without interpretation? You cannot do it! And the mass of the people asks: "Who is going to teach? What is he going to teach? Why is he going to teach?" Yes, "Why religious education in secular schools? Private funds will bear the expense." But public funds erect and maintain public institutions. We protest as vigorously against religious education in the public schools as we would against a course in Bolshevism.

"But surely," we hear someone say, "religious education is imperative today." It certainly is. The Lutheran church has said that since the days of the Reformation. If the churches represented by the Ministerial Association feel the necessity of religious education for their children, let them erect buildings and support teachers of their own, as we have ever done. Religious education is the sacred duty and the inalienable right of the parents and the church, not of the secular state. The entire activity of the state is limited to the life of its citizens in this present time. Its duty is to safeguard the people's interests—their industrial pursuits, their possessions, and their guaranteed rights. Now, then, if the state has no responsibility for, and no jurisdiction over, the souls of its citizens, what qualifications and competence has it to teach them religion? ⁸¹

As has been mentioned, the Universalists and the Unitarians are opposed to it. The Catholics are opposed not only to the Protestant Bible but to the interpretation of any reading from the Bible.⁸² The Baptist Association of Virginia has led a vigorous opposition to the Bible in the public schools. Their opposition before the legislature of Virginia was instrumental in defeating a Bible-reading bill that was before that state.

The Baptist *Memorial*, a protest against compulsory Bible reading drawn up by the Baptists and presented to the 1926 legislature of Virginia by the Honorable John Garland Pollard, at that time dean of the College of William and Mary

⁸¹ Petition filed by Lutheran ministers of Lansing, Michigan, with the Board of Education against religious education in the public schools of Lansing.

⁸² See Lawrence A. Stith, "Bible Reading in the Public Schools," *Law Notes*, 32:225-28 (March, 1929).

at Williamsburg and more recently governor of the state, is an example of the many protests that have been entered against such reading and is worthy of careful consideration. Excerpts from the text of the *Memorial* are as follows:

The undersigned committee, on behalf of the Baptist General Association of Virginia, composed of 1,175 white churches, with a total membership of 219,166 citizens of this commonwealth, having been informed that a renewed and concerted effort will be made by numerous citizens and organizations to have your honorable body at its next session pass the bill defeated at the last session, or any similar bill, compelling teachers in public schools of this state to read the Bible daily in schools, hereby enters its solemn protest against the passage of any such measure, and in support of its protest, presents the following facts and considerations, and recurs to the following fundamental principles:

1. The Bible is distinctly a religious book, and when properly read is an act of worship which cannot rightfully be enforced by law. Law rests on force. Religion is voluntary. Any attempt to promote religious worship by force of law is, in the language of our statute of religious liberty, "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in His almighty power to do."

MANY DIFFERENT VERSIONS ³³

2. There are many versions of the Bible. One of these, commonly used by Protestants, is known as the King James version; another, used by Catholics, is known as the Douay version, which contains entire books not appearing in the King James version. These two versions differ in many particulars considered material by the respective sects. Our Jewish fellow citizens do not consider the New Testament as a part of their Bible. If the law is to compel the reading of the Bible, the question at once arises, Shall the Protestant, Catholic, or Jewish Bible be read? The proponents of the proposed law would doubtless answer, "The Protestant Bible should be read, because it is the Bible of the majority." To compel

³³ The subdivision topic heads have been supplied.

the numerous Catholic and Jewish teachers in our schools to read a Bible which they do not consider the true Bible, is not only an invasion of their right, but also of the rights of the non-Protestant pupils and their parents.

MUST CONCEDE RIGHTS OF OTHERS

We may best realize the wrong involved by imagining our own feeling of protest, should the law compel the reading of the Roman Catholic version to our Protestant children. Protestants can claim nothing on the score of conscience that they are unwilling to concede equally to others. It is not a question of majorities, for if the conscience of the majority is to be the standard, there is no such thing as the right of conscience at all. It is against the power of majorities that the right of conscience is protected. This right is an indefeasible natural right of man of which no free government can deprive him. There are some rights which even the majority cannot take away, and the right of conscience is the most sacred of these. Government should never interfere unless men, under the guise of conscience, commit acts which violate the good order of society.

DIFFERENCES FUNDAMENTAL

To the Protestant, the Catholic Bible is a sectarian book. To the Catholic, the Protestant Bible is a sectarian book. To the Jew, the New Testament is a sectarian book. To the citizen who has no religion, all versions are sectarian. To select the textbook of any sect to be read in the public schools is to confer a peculiar advantage upon that sect. This is expressly prohibited by the constitution of the state (Section 56). It is a mistaken idea that the Protestant religion, or even Christianity, has in Virginia any peculiar rights. Christianity may have been once a part of the common law, but this has long since been changed in Virginia, both by statute and constitution. The Supreme Court of Appeals has said that the ancient law on the subject "was wholly abrogated by our Bill of Rights, and the act for securing religious freedom, subsequently ingrafted in the amended constitution, which wholly and permanently separated religion, or the duty which we owe to our Creator, from our political and civil government; putting

all religions on a footing of perfect equality; protecting all; imposing neither burdens nor civil incapacities upon any; conferring privileges upon none. Placing the Christian religion where it stood in the days of its purity, before its alliance with the civil magistrate; when its votaries employed for its advancement no methods but such as are congenial to its nature; . . . proclaiming to all our citizens that henceforth their religious thoughts and conversation shall be as free as the air they breathe; that the law is of no sect in religion, has no high priest but justice. Declaring to the Christian and the Mahomedan, the Jew and the Gentile, the Epicurean and the Platonist (if any such there be amongst us), that so long as they keep within its pale, all are equally objects of its protection."—Perry's Case, 3 Gratianus, 641.

ALL ON EQUAL PLANE

Not only does the constitution place all sects on the plane of absolute equality before the law, but, as if forever to banish the force of law from the realm of religion, it actually protects the individual from the church of his own choosing, by prohibiting the general assembly from authorizing any religious society to levy a tax even on themselves—again recognizing that the law must not be used to enforce any religious duty.

History teaches us that the principle here contended for was established after centuries of struggle marked by persecution and bloodshed, culminating here in Virginia, whose government was the first in the world to proclaim complete and absolute religious equality before the law. Jefferson, who led the movement, declared it to be the bitterest fight in which he was ever engaged. Truly it is a blood-bought blessing, and we consider it our duty to seek to protect it against the slightest encroachment.

SHOWS INHERENT WEAKNESS

3. The bill as proposed contains two provisions intended to protect the rights of conscience, but which disclose the inherent weakness of the whole proposition. It provides that at least five verses must be read without comment. It compels reading, but prohibits study. It also provides that pupils may be excused from

the classroom during the reading of the Bible, upon written request of either parent. This provision is a recognition of the fact that any version of the Bible used will be looked upon by some as a sectarian book, and as a measure of justice to such, their children may withdraw from the classroom. But this does not correct the injustice, for it is unkind and inconsiderate to subject the children of the small minority to the embarrassment of excluding themselves from a stated school exercise, especially because of apparent hostility to that version of the Bible which the majority have been taught to revere. The excluded pupil will lose caste with his fellow students, and is liable to be the object of reproach, and perhaps of insult. Such a course would tend to destroy the equality of the pupils, which the law ought to maintain and protect.

MAY SUBMIT IN SILENCE

It is probable that a great number of non-Protestant parents, rather than subject their children to the embarrassment of separating them from their fellow pupils during the reading of the Protestant Bible, will submit to the injustice in silence, hoping for the day when minorities shall grow into majorities. In this connection it may be well for Protestants to remember that in some of the states, the Catholics are already, or soon may be, in a majority. May we reasonably expect from them better treatment than we accord them? It will be a sad day for the cause of public education when religious sects begin to vie with one another for the control of the schools. We must not drive the entering wedge of dissension into a system which is the bedrock of our republican institutions.

Moreover, while the proposed act seeks to leave some discretion to the pupils, none is left to the teacher, who is commanded by law to read the Bible, and, presumably, will be punished for failing to do so.

COMPLETE EQUALITY FIRST PRINCIPLE

4. The right to worship God according to the dictates of one's conscience is firmly established throughout America. But this is not all of religious liberty. It is broader. It means complete and

absolute equality before the law of all religions. The state should have no favorites in matters of religion. Its only relation to religion is to protect all of its citizens in the sacred rights of conscience, just as it protects them in their rights of person and property. If there is one teaching which history makes clear, it is that Christianity prospers most under those governments which as such seek to help it least. A false religion may need the peculiar recognition of the law, but it is beneath the dignity of the true religion to ask or accept it. From the early days of the Christian era down to the present time, some of Christ's zealous followers have, in violation of His teachings, sought to promote His cause by force, first by burning at the stake, later by stripes or imprisonment and by taxing others to promote a religion in which they did not believe, and today we have the last faint glimmer of that hoary fallacy remaining with those good people who erroneously think they can aid religion by invoking the strong arm of the law to compel the reading of the Bible. How blind to the teaching of history and the principles of Him who said, "My kingdom is not of this world"!

REGARDED AS LITERATURE

5. Some argue that the law should compel the reading of the Bible, not as a religious book, but simply as literature. But this is evidently not the viewpoint of the proponents of this bill, for, as if to minimize the wrong done sects who do not accept our Bible, they limit the reading to five verses, prohibit comment, and excuse pupils from attendance upon the reading. The truth is that the Scriptures cannot be separated from their sacred religious character, and any move to advance their acceptance through secular authority under pressure of law, is an unworthy attempt to shift upon the state a solemn duty divinely commissioned to the church. The realm of religion is entirely beyond the scope of the state. True, it is sadly neglected, but the remedy is the re-establishment of the family altar and a redoubling of the efforts of the churches.

6. We wish it distinctly understood that we are in full accord with the proponents of the bill in their belief in the importance of training our children in the great religious truths taught in the

Bible. Its importance cannot be overstated. The only difference between us is one of method, but that method involves a great underlying principle which is a part of our religious as well as our political faith. Our public school system belongs to the members of all religious denominations, and those who are attached to none, and we must respect each other's rights in common property of us all. Religious training our children must have, but it should be given in our homes and churches, and not at the expense of those who do not believe in our Bible. We maintain that each Christian body should advance its own religion by its own efforts and at its own expense, and that any attempt to get the force of the state behind our religion, even to the extent of compelling the reading of five verses from our version of the Scriptures, begets a suspicion that our religion cannot stand on its own merits. We are unwilling to admit, but on the other hand emphatically deny, that the textbook of our religion needs the strong arm of the law to support it.

RELIGIOUS INSTRUCTION VITAL

We fully agree that the religious instruction of the child should be given along with its secular training, but it by no means follows that it must be given by the same persons and in the same place. Our Catholic fellow citizens do not agree on this proposition, and maintain separate schools where religion may be taught; but it will hardly be maintained that their children are better than others, or grow up to make better citizens. The important thing is for our children to have religious instruction, and it is not essential that any part of such instruction be given in the day schools under governmental control and at public expense.

7. Baptists in this state would suffer no direct injury from the proposed law, for the Bible which would be read in the schools is the version which the Baptists use; but the Baptists of Virginia know historically what discrimination against their religion means. Not many generations ago, when they were few in number, their ministers here in Virginia were punished and imprisoned for preaching the gospel; and now that they have grown to be the largest religious denomination in the state, they would be unworthy of the suffering and sacrifices of their forefathers

and would lay themselves open to the charge that their love of right is for themselves only, if they did not seek to protect the religious rights of others.

WOULD PILFER RIGHTS

8. This matter seems trivial to some, who argue that the compelling of our teachers to read five verses of the Bible each day involves an infringement of their right so infinitesimally small that the law may well disregard it; but, to say the least, such a law would be a piece of petty pilfering of the rights of the minority sects, which would make us none the richer, but would brand us as offenders against the sacred rights of others, and render us easy marks for retaliation when circumstances are reversed.

The matter is in truth one of tremendous import, not perhaps in itself, but because it is a violation of principle; and one violation leads to another, until the principle itself is in danger. The mere reading of five verses of Scripture without comment will not and cannot satisfy those who believe that religious training should be given in the public schools. The next step will be the actual teaching of the Bible, and when this is established, how strong the argument will be that inasmuch as the Protestants are teaching their Bible at public expense, therefore the Catholics should be permitted to do the same, hence public schools funds should be appropriated to Catholic schools, so as to give them an equal opportunity to teach their Bible at public expense. Such a division of school funds has already been accomplished in some parts of Canada, and will come in this country if success meets the efforts of those who insist on injecting matters religious with their inevitable sectarianism into our public school system. The dismemberment of that system will be the natural fruitage of the adoption of the pending bill.

APPEAL FOR LIBERTY

We therefore appeal to your honorable body to adhere to the doctrine, peculiarly bound up with the history of this Commonwealth, which completely separates church and state, which refuses to exercise force in the realm of religion, and which places all religions on a plane of absolute equality before the law.

The above memorial sets forth in simple form many of the arguments which are frequently used against the reading of the Bible in the public schools; also the dangers involved in such practices. It points out that invasions which may frequently appear harmless in themselves may lead to practices which are contrary to and inconsistent with the principles of a complete separation of church and state.

The Bible bill was defeated in the Virginia legislature by an almost unanimous vote after the above *Memorial* was presented. The Virginians are still mindful of the great principles of religious freedom so clearly enunciated by Thomas Jefferson.

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PART II

SECTARIAN INFLUENCES OTHER THAN BIBLE
READING IN THE PUBLIC SCHOOLS

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CHAPTER VIII

RELIGIOUS INSTRUCTION

I. EXCUSING PUPILS FOR RELIGIOUS INSTRUCTION ELSEWHERE

A PRACTICE that is gaining in many schools and that some people think will solve the problem of religious training in the public schools is that of dismissing pupils during certain periods of the week to obtain religious instruction in the churches or elsewhere. Upon request of their parents or guardians, pupils are permitted to go to the church school where the kind of religious training they desire may be given them. Such an arrangement not only makes it possible for students to receive religious training from whatever church they desire but also keeps out of the public schools this whole controversial question with respect to Bible reading, comment, sectarian influences, and religious instruction.

Others, however, view the proposal to give the pupils hours off at stated periods during the week to attend a religious school of their own choice in the neighborhood as objectionable in practice even though innocent in appearance. It is maintained that such a practice establishes a precedent which opens wide the door to influences that may nullify the fundamental character of the public school system. It seems reasonable that some should object to taking from the school program time that belongs to the regular school work. The great danger, however, in giving time off during school hours for religious instruction is not merely that there would be too great a loss of time from secular education but that there would be a temptation for ambitious ecclesiastics of every kind to propagate under the protection of public school auspices their own peculiar notions of reli-

gious training, that there would be a possible conflict among the children themselves in prying into each other's religious affiliations, that the door would be opened to every form of intolerance and bigotry that has plagued mankind under the guise of religion—potential dangers that must not threaten our public school system.

This practice, when followed, generally consists in excusing the children early one afternoon a week so that they may go elsewhere for religious instruction. All the pupils may be excused, in which case those who do not go to the churches or church schools for religious instruction may go to their homes. In some cases only those are excused who go for religious instruction, and the others remain in school. Of the two practices, the former would seem to be the more desirable, since there is no discrimination.

Some states specifically authorize the excusing of children for such religious training. For example, in Minnesota the compulsory attendance statute expressly authorizes school boards to dismiss pupils upon the request of their parents for a period not exceeding three hours a week to enable them to obtain religious education elsewhere.¹

In New York such practice was brought to the attention of the court in the case of *Stein v. Brown* in 1925,² an action brought by Stein against the school board to enjoin them from allowing the pupils of the public schools of the city of Mount Vernon to be excused from school instruction for forty-five minutes once a week for instruction in the churches to which the parents desired them to be sent. Plaintiffs also requested that the school board refrain from having printed, in connection with the said plan, cards to be filled out by the teacher of the religious instruction in the various churches in order to notify the school authorities that the children had been present. These cards were printed and distributed at the

¹ Minnesota General Statutes, 1923, Section 3080.

² 211 N. Y. S. 822, 125 Misc. Rep. 692. For a discussion of this case see "Religious Instruction," *Minnesota Law Review*, 11:571, 572 (May, 1927).

expense of the Board of Education of Mount Vernon. The cards were printed at the school as an exercise for the boys in industrial arts. The cost of the cards was paid by a Committee on Week-day Religious Education. Thus no use was made of public funds but only of the presses that were property of the city.

The question here was whether the use of public property for such printing constituted the use of public funds for sectarian or religious purposes in violation of the following constitutional provision:

Neither the state, nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.⁸

and whether the rulings of the Board of Education were subject to review in any court.

The court held that neither the state nor any subdivision thereof could use its property, funds, or credit in aid of a school of learning wholly or in part under the control of any religious denomination. The fact that no particular denomination was favored by such action did not alter the case.

The court held further that to excuse pupils from school for a regular period of religious instruction was unlawful under the laws of the state of New York of 1921, which required the attendance of pupils during the school session with the exceptions specified. Religious instruction not being one of those exceptions, it was held unlawful for a board of education to substitute a period of religious instruction away from the school in place of the instruction required at school. To permit the children to leave the school during school hours for religious instruction, said the court, would be, in effect, to substitute religious instruction for the instruction

⁸ Constitution of New York, Article 9, Section 4.

required by law. It was further argued that those who leave the school weekly for religious instruction, being deprived of the instruction given at school during that period, are likely to fall behind those that remain the full time.

The court contended that in many school districts there is only one church sufficiently near the school to be reached by the children attending that school; that the practice of excusing children for religious instruction would favor that church, whatever its denomination; that religious instruction belongs to the parents of the children, the churches, and religious organizations of the country, and hence it should be given outside of the public schools and outside of school hours.

The court held that Section 890 of the educational law, which provided that the rules of the Board of Education can be reviewed only by the state commissioner of education, does not apply to a taxpayer's suit to enjoin improper use of funds, or to the determination of constitutional questions, or to illegal acts on the part of officers.

That part of the decision prohibiting the excusing of pupils for weekly religious instruction was overruled two years later, in 1927, in the case of *People ex rel. Lewis v. Graves*.⁴ Lewis sought an order to compel Graves, the commissioner of education, to order the school authorities of the city of White Plains to discontinue the school regulation whereby, at the request of their parents, pupils might be excused for a half hour each week just prior to the close of the school session to receive religious instruction in church schools. This arrangement of excusing children was made to please persons interested in religious instruction in the public schools of the state. The plan had been put into operation in White Plains and, with some varying details, elsewhere. The child so excused would lose no school recitations and would receive no credit for the work taken in the church school. No public money was used to aid the church schools, though the

⁴ 245 N. Y. 195.

cooperation between the public schools and the church schools required a slight use of the time of the public school teachers in registering and checking up excuses. The plan was covered, as we have seen, by suitable regulations of the school authorities in the absence of any legislative enactment.

The court held that the practice of excusing children for thirty minutes a week was not a diversion of public funds sufficient to constitute a violation of Article 9, Section 4, of the state constitution already cited above,⁵ nor was such practice a violation of the educational law providing for compulsory school attendance, which requires that pupils

shall regularly attend upon instruction for the entire time during which the schools . . . are in session.⁶

The court called attention to the need of leaving room for discretion on the part of the school authorities in the practical administration of the public schools, of giving to the commissioner of education the power to adopt such regulations as will restrict the local authorities when the administration of the plan of week-day instruction in religion, or any plan of outside instruction, in his judgment interferes unduly with the regular work of the school. On the other hand, the court pointed out that neither the constitution nor the laws of New York discriminate against religion and that denominational religion is merely put in its proper place outside of public aid or support. To maintain a clear distinction between church and state, religion need not be placed at a disadvantage nor given an inferior ranking, but public funds may not be used for its support. In its opinion, which was concurred in by Chief Justice Cardoza, the court said:

Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as a mat-

⁵ Quoted on p. 131 above.

⁶ Educational Law of New York State, 1931, Section 621.

ter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case.

It should be noted that the children here excused lost no recitations and received no credit for the work done in the church schools. In commenting upon the case, Dr. Frank P. Graves, commissioner of education for the state of New York, said:

In my judgment this plan marks the limits to which public school officials should go in the matter of denominational religious education, and any extension may be regarded as an undue interference with the regular work of the schools. In fact, I believe it would be much better if pupils are to be excused at any time for religious instruction, to dismiss them half an hour early at the end of the week and permit them to go to their respective places for religious instruction, if they wish to go at all. No compulsion should be brought to bear by the school authorities to make them go. Of course the parents might do this, but the machinery of the school should not be used.⁷

A plan adopted in Wisconsin was declared unconstitutional by the attorney-general. Cards asking that children be excused from school one hour each week to receive religious instruction were handed to pupils by the teachers, signed by the parents, returned to the teachers, sorted by them, and passed on to the ministers of the churches designated by such parents. The attorney-general⁸ decided that public money was being used for religious purposes or for the dissemination of sectarian instruction in public schools, in violation of the provisions of the constitution stating:

nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.⁹

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable;

⁷ Opinion rendered to the New York State Sunday School Association by Frank P. Graves, commissioner of education for the state of New York, given in *Religion and Public Schools*, University of the State of New York Bulletin, Law Pamphlet 6 (Albany, 1927), p. 5.

⁸ Wisconsin Attorney-General's Opinion 483.

⁹ Constitution of Wisconsin, Article 1, Section 18.

and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.¹⁰

The attorney-general ruled that school boards have power to fix hours during which school shall be held and to excuse all pupils or any group of pupils for any reasonable period, provided that neither school boards nor teachers have, as a part of their school work, any direct or indirect connection with the dissemination of religious instruction and that no part of the school machinery is used for that purpose. This may be avoided, of course, by simply leaving to the parents and the churches the matter of checking up on the students after they are dismissed. This ruling in Wisconsin goes a little further than that of New York, which permits the use of a limited amount of school time for registering and checking up excuses.¹¹

The plan of excusing pupils for certain periods to obtain religious instruction elsewhere has perhaps been best demonstrated in the industrial city of Gary, Indiana, in what has come to be known as the Gary plan. Here the school schedule has been so arranged that all pupils whose parents so request may attend schools conducted by the various churches and synagogues of the city during a part of each school day. The child may be excused during the day to take private lessons at home or to attend one of the churches or church schools for religious instruction. What is taught in these outside classes is not the concern of the public school. The pupils either go directly from the home to the church school and then to the public school or else directly from the public school to the church school and then home. Attendance at the church or church school is not compulsory but is entirely a matter between the church school and the home.¹²

¹⁰ *Ibid.*, Article 10, Section 3.

¹¹ People ex rel. Lewis v. Graves, *supra*.

¹² For a description of Bible study as practiced in the Minneapolis schools see the article entitled "Religious Classes Found a Moral Aid" in the *New York Times*, July 5, 1931.

The Gary plan is recommending itself in some places as a practical solution of the problem of religious education. As we have seen, the school is in no way concerned in this religious teaching. It merely cooperates to the extent of providing an opportunity for those who desire it, leaving it to the parents to arrange for such teaching and to determine whether or not their children shall receive religious instruction, as well as how they shall get it, and what it shall be. The children receive such instruction under priest, pastor, or teacher in their own church or parish house, or at the hands of their parents. No recognition or credit is given for studies pursued in the churches or church schools.

II. ALLOWING CREDIT FOR RELIGIOUS INSTRUCTION

Another question that has come up in connection with pupils being excused from the public schools for a certain period a week to receive religious instruction in their several churches, church schools, and elsewhere, is whether credit may be given for such work by the public schools and apply toward graduation.

It was decided in the Washington case of *State ex rel. Dearle v. Frazier*,¹³ that credit may not be given in that state for religious instruction received outside the school. Here action was brought by Albert Dearle, a pupil, against Frazier, superintendent of schools, to force Frazier to give him an examination in Bible studied outside of school and to give him credit therefor, to be applied toward high school graduation.

In 1915 the State Board of Education had passed the following resolution:

Since the board looks with favor upon allowing credits for Bible study done outside of school, it is moved that a committee be appointed to consider a plan for allowing such credits, one-half credit to be given for Old Testament and one-half credit for New Testament on the basis of thirty to thirty-two credits

¹³ 102 Wash. 369 (1918).

for high school graduation, and that a syllabus of Bible study be issued under the auspices of the state department of education with rules and regulations for the distribution of examination questions at least once a year.¹⁴

In compliance with this plan a number of schools made provision for outside Bible study. The school was to pay for the syllabus, give the examination, grade the papers, and determine the credit.

The constitution of Washington includes these provisions against the use of public money for any religious exercises or instruction:

No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.¹⁵

A Washington statute provides:

It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity, and patriotism; to teach them to avoid idleness, profanity, and falsehood . . .¹⁶

The court by unanimous decision held that the practice provided for in the resolution adopted by the State Board of Education in 1915 constituted an expenditure of public funds for "religious worship, exercise, or instruction," or for the support of a "religious establishment," which was prohibited by the constitution. The court built up its argument primarily on statements in the constitution, namely, that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction . . ." ¹⁷ and "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control

¹⁴ State ex rel. Dearle v. Frazier, *supra*.

¹⁵ Constitution of Washington, Article 1, Section 11; Article 9, Section 4.

¹⁶ Washington Laws (Pierce), 1929, Section 5051.

¹⁷ Constitution of Washington, Article 1, Section 11.

or influence.”¹⁸ These words, the court said, “are sweeping and comprehensive.” Not only are “religious exercises” and “instruction” prohibited “but their natural consequence—religious discussion and controversy.” The court pointed out that if the pupil answered in a way that was consistent with the faith of his instructor, he would undoubtedly be counted worthy of a passing grade and receive credit for his work, but that such an arrangement is open to objections on the ground that the examiner may not know the faith and teachings of those of a different sect. Furthermore, to give credit in the public school for such instruction is to give credit for sectarian teaching and influence, which is forbidden by the constitution. The court said:

It is no more than a subterfuge to urge that the public moneys will not be applied for religious instruction because the teaching is done outside the school by a preacher or priest, or in the home of the pupil, or by a religious organization with which the student may be affiliated, for the time of the teachers, as well as their technical skill, will be consumed while under the pay of the state in furnishing the syllabus or outline, the conducting of examinations, the rating of papers, and the determining of proper credits.

The court took the position that a compromise of opinions in these matters would lead to confusion in what would make the courts the judge in determining what is and what is not religious worship, instruction, or influence. This, it maintained, would be as intolerable to the citizen as it would be to leave the decision to a school board. It is on that basis that some courts have upheld the constitutionality of Bible reading where statutes did not specifically prohibit such reading. Such courts, said the court, have inclined to the letter rather than to the spirit of the constitution.

What guarantee has the citizen that the board, having a contrary faith, will not inject those passages upon which its own sect rests its claim to be the true church under the guise of “nar-

¹⁸ *Ibid.*, Article 9, Section 4.

rative or literary features"; and if they did so, where would the remedy be found? Surely the courts could not control their discretion, for judges are made of the same stuff as other men . . .

There was no discussion of the policy of excusing the children for religious instruction, the question here involved being whether credit might be given for such instruction. The practice of opening school each morning with prayer as well as reading the Bible is prohibited by opinions rendered by the attorney-general.¹⁹

As a result of the influence of certain religious organizations, several states are, however, allowing credit for Bible study conducted in conjunction with the State Department of Education. In 1919 the State Board of Education of West Virginia approved and adopted a plan of accredited Bible study issued by the West Virginia Council of Religious Education. The Council declares:

This happy consummation is a result of the work of the joint committee representing the State Sunday School Association and the State Education Association . . .

The executive committee of the West Virginia Sunday School Association . . . approved and endorsed the plan as did the West Virginia Education Association. . . . The action of these two bodies was reported to the State Board of Education with the result above reported.

By this action "the West Virginia Commission on Accredited Bible Study" was created, to consist of five members as follows: The general superintendent of the West Virginia Sunday School Association, the state supervisor of high schools, one member elected by the State Board of Education, one member elected by the West Virginia Council of Religious Education, one member elected by the West Virginia Education Association.²⁰

The plan for Bible study adopted by West Virginia is virtually the plan that Indiana is following. One high school

¹⁹ Opinions of the Washington State Attorney-General, 1915-16, p. 254; 1909-10, p. 135; 1891-92, p. 142.

²⁰ West Virginia Council of Religious Education Department Leaflet No. 504 (Charleston, 1925).

credit is allowed for such Bible study. This credit may be substituted for any elective appearing in the regular high school course. The teacher of the Bible study for which the pupils seek high school credit must meet the academic and professional requirements of the high school in which the credit is sought. Certain equipment is required. Each class must be held in a separate room, which must "be equipped with tables, maps, charts, blackboards, cases for books, and a reference library of at least six (6) volumes, one of which must be a good Bible dictionary." A recitation period of at least forty-five minutes is required. Examinations are to be held twice each year concurrently with the regular semester examinations. "These examinations shall be conducted under the direction of the principal of the high school in which the credit is sought. When the work is done in the high school under arrangement and direction of the principal, papers should be set and examined by the teachers as in all other courses. This applies both when the course is taught by a regular member of the faculty, and by anyone not a member."²¹ Where the Bible course is taken outside school for credit, the commission takes charge of preparing the examinations and grading the papers. The commission has also prepared a syllabus for these Bible courses, which, it states, "are not intended to be made a part of public school teaching, nor are public school funds to be used to provide this Bible teaching." Any version of the Bible may be used—namely, the King James, the American Revised, the Douay, or the Leeser. Whenever a local high school board in West Virginia approves the above plan, it automatically goes into effect in that high school, and the Bible syllabus becomes an elective course in that school.

The commission points out that it has found that the state university and all the normal schools, as well as the denominational schools and colleges in West Virginia, will accept and allow one unit of credit in Bible study from any of the

²¹ *Ibid.*

accredited high schools in the state as one of the units required for college entrance. The commission recommends that students who contemplate entering colleges and universities outside West Virginia should find out whether such Bible credit will be accepted for college entrance.

The expense incurred in promotion work are, by the request of the commission, to be paid by the West Virginia Council of Religious Education. A report issued by this organization on January 1, 1926, showed that 39 such classes had been conducted, with an enrollment of 628.²²

In 1916 the State Board of Education of Virginia authorized certain accredited Bible courses for high school pupils. A commission representing Catholic, Jewish, and Protestant churches was appointed. In the school year 1916-17 one class of 27 pupils prepared for examination in such a course; in the year 1923-24 there were 40 classes with an enrollment of 933 pupils examined.²³ As is the case in most of the states allowing credit for such Bible study, the teaching may be done in Sunday schools, Sabbath schools, or vacation schools, Y. M. C. A. or Y. W. C. A. classes, or in private schools or classes.

North Dakota has a plan of Bible study for high school students whereby "high school students may take Bible study in the Sunday school, parochial classes, or in separately organized classes, and secure one unit of credit toward graduation." The Department of Public Instruction sets up the standards under which the work must be done, conducts the examinations, and issues the credits, and the North Dakota Council of Religious Education "prints the outlines, handles the books, and helps organize the classes."²⁴ The outline of the course consists of a brief outline of the Old and New Tes-

²² Report Accompanying the West Virginia Council of Religious Education Leaflet No. 504. The figures are obviously for a year's enrollment, but the report is not clear whether they are for the school year 1924-25 or 1925-26.

²³ Official Syllabus of Bible Study for High School Pupils, Virginia State Board of Education Bulletin, Vol. 4, No. 1.

²⁴ *The North Dakota Plan of Bible Study for High School Students* (Department of Public Instruction, Bismarck).

taments, one-half unit of credit being allowed for each. The minimum requirement as to text and reference materials is that each student have a copy of the syllabus and a Bible. The instructor should have one map, two reference books for each Testament, and a Bible dictionary for the use of the class. Wherever it is desired to organize such a Bible study class, the ministers of the churches are to consult and arrange with the principal or superintendent of the local high school. No definite amount of time is required to be spent upon the course. The contents of the syllabus may be mastered privately or by class study. No state or public school buildings may be used for religious instruction, nor may such instruction be given by public school teachers during school hours.

Maine has an accredited "Bible Study Plan" which has been in operation for several years. According to Bertram E. Packard, state commissioner of education, the plan²⁵ provides for Bible study conducted by the churches outside of the public schools with the aid of outside teachers. The examinations are conducted by the state and credit is given for the work. These credits are accepted by the public high schools, colleges, and universities of the state. According to the commissioner of education the State Department of Education desires to encourage religious education but "does not think it wise to enter definitely upon the task of teaching the Bible, for that would tend to break down the principle of the separation of church and state, which, on the whole, has justified itself in American life."

Colorado also has a plan of Bible study, for which credit is allowed toward high school graduation. The plan was worked out with the Teachers College at Greeley, Colorado. The experience there led others to work out a plan for high school students in other parts of the state.

One of the states that has recently adopted a most elabor-

²⁵ "Encouraging Religious Education," *United States Daily*, April 25, 1931, p. 10.

ate course of study in Bible history is Montana. Elizabeth Ireland, state superintendent of public instruction, explains its origin thus:

During 1929-30 the Montana State Department of Public Instruction received numerous requests from individual clergymen, from representatives of the ministerial associations in Montana, and from superintendents and principals of high schools for a course of study in Bible history. After a thorough investigation and examination of many courses of study, it was recommended by the Montana clergy and ministerial associations that the Michigan course of study be adopted for use in Montana.²⁶

Arrangements were accordingly made and permission was secured to use the Michigan syllabus in the Montana schools. This 172-page syllabus contains outlines of courses and a great number of notes and other discussion. The course outlined includes Great Old Testament Characters, The Bible as Literature, The Life of Christ, The First Century of the Christian Church, The Bible in the Making, The Life of Christ in Picture, Song, and Story, Old Testament History, The Bible as an Interpreter of the Interrelations of Social Institutions and a Guide to Right Living, Biblical Allusions, The Exodus, The Deliverance at the Red Sea, The Waters of Marah, The Quail and the Manna, The Smitten Rock, The War with Amalek, The Golden Calf, Moses on Mt. Sinai, and others. Considerable memory work is required. The Ten Commandments are to be memorized, and complete passages of about twenty verses from such selections as the discouragement of Elijah (I Kings 19:1-18), the building of the wall (Nehemiah 4:15-23), the prayer for pardon (Psalms 51:1-19), the transient and the eternal (Psalms 90:1-27), Daniel's being cast into the den of lions (Daniel 6:16-23), and God's rule on earth (Isaiah 2:2-4). An examination of the syllabus shows it to contain such controversial ques-

²⁶ Course of Study, State of Montana, Bible History, Syllabi Nos. I, II, III (Helena, 1932), published in Montana with the permission of the Michigan Education Association by the state superintendent of public instruction.

tions as the creation; the Garden of Eden; the temptation of Eve and sin; Noah, the ark, and the flood; the Ten Commandments; the divinity of Christ and His miracles; and many others.²⁷ At once the question arises, How are such subjects going to be taught in the public schools? If the answer is that they are taught outside the public school, then the questions present themselves, How are the examinations to be given? The papers to be graded? The courses here outlined differ little from courses of Bible study taught in church and denominational schools.²⁸

Recently a controversy has been raging between the Interfaith Committee and the Teachers' Union of Greater New York over the question of having religion taught to high school students outside of school hours by instructors paid by the churches, and of allowing such students regents' credits for the work taken.²⁹ The Teachers' Union protested against the allowance of such credits as substitutes for secular studies on the ground that it is a violation of the spirit of the principle of the separation of church and state, if not of the letter of the law.

The Interfaith Committee, which is composed of a certain group of leaders in the Catholic, Jewish, and Protestant faiths, asked for the privilege of instructing high school students of Greater New York in the fundamentals of religion, this instruction to be given outside of the school by special instructors paid by the churches. They have also requested the school authorities to grant school credits for such religious instruction. When this request was made, the American Association for the Advancement of Atheism likewise petitioned the superintendent of schools in New York to allow their association to have access to these same high school

²⁷ *Ibid.*

²⁸ For plans and proposals for allowing credit for outside Bible study in the different states and in various institutions, see Clarence Ashton Wood, *School and College Credit for Outside Bible Study* (New York, 1917).

²⁹ "Bible Study for New York School Pupils," *Literary Digest*, July 4, 1931, p. 26.

students for the purpose of instructing them in atheism, this instruction likewise to be given outside school hours, by special instructors, and at the expense of the association, and to allow regents' credits for such instruction.

This plan of allowing credit in the public schools for religious instruction has provoked a storm of protest from Catholics, Jews, and Protestants alike. In protesting against the allowance of credit for religious instruction given under the control and direction of religious organizations, the Teachers' Union seems to have the best of the argument. It declares that such a departure is in violation of the constitution of the state of New York, which reads:

Neither the state, nor any subdivision thereof, shall use its property or credit or any public money, or authorize and permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.³⁰

Aside from the constitutional question here involved, there is serious question of the advisability of allowing public school credit toward graduation for religious instruction given by religious teachers under denominational control. It is fraught with grave danger. The public school system was established for the purpose of imparting secular instruction, and the church for imparting spiritual instruction, each to work independently and separately in its own sphere. The giving of school credit for study and instruction in the church is likely to provoke religious controversy; it may pave the way for still greater encroachments, and may ultimately even open the door to all the evil conditions that attend a union of church and state.

If the state is to grant scholastic credit for religious instruction given under the control of the Interfaith Committee in the Douay, the King James, and the Jewish ver-

³⁰ Constitution of New York, Article 9, Section 4.

sions, then it is difficult to say on what ground it can refuse similar credit for religious instruction given by the leaders of paganism, Mormonism, Christian Science, Spiritualism, Swedenborgianism, Buddhism, or Brahmanism. These religions exist in America, and many of them are educating their followers and children in their own religious institutions and at their own expense. It is quite likely that the Interfaith Committee would object to allowing credit for such teachings, and if it did, it would be guilty of discrimination contrary to the constitution of New York, which provides that "no discrimination or preference" to religion shall be made by law against any citizen or "religious profession."⁸¹

In the past the movements for a union of church and state, whether they have been Catholic or Protestant, have always been inaugurated with mild measures that appeared innocent enough on the surface. The first step has always been a union of divergent church forces, which have taken the initiative and perfected the preliminary steps. After these divergent church forces have gained the necessary strength and popularity, they have sent out feelers toward the political institutions, in the hope of obtaining cooperation and political aid for the furtherance of church ends. What were first considered voluntary and suggestive measures afterward resolved themselves into ecclesiastical and political coercion.

By some it is feared that the Interfaith Committee's plan will ultimately result in the teaching of religion by the state. That, they say, is virtually what some of the states, such as Indiana, Virginia, Colorado, North Dakota, Maine, Montana, and others, are doing today. There is but one way to escape from such a contingency and that is to deny to the state the authority to meddle with religious questions or to form any kind of alliance with church and religion. Only as this demarcation between the functions of the church and those of the state is kept distinct can we protect and safeguard the rights of the citizen and preserve the stability of

⁸¹ *Ibid.*, Bill of Rights.

religion. The fact that a state excludes religion from its educational curriculum and allows credit only for secular studies does not mean that the civil government is hostile to the Bible, to religion, or to religious teaching. It is only the evidence of its neutrality toward all sects, which cannot be maintained except by excluding religion from its curriculum. This attitude of neutrality and the exclusion of religion from the curriculum is in fact friendliness toward the Bible and the church, since only by a rigid separation of secular and church affairs can the church have the benefits of religious tranquillity and peace.

CHAPTER IX

PUBLIC AID OF SECTARIAN SCHOOLS

THE CONSTITUTIONS of all the states prohibit the appropriation of public funds for sectarian purposes and, with few exceptions, specifically prohibit the appropriation of school funds for the aid or support of any sectarian school. Those constitutions that do not include such specific prohibitions imply them in the general terms of the law. Thus the question here involved is, What constitutes public aid of a sectarian school? During the past few years this question has been carried to the courts of a number of states for judicial interpretation.

Kentucky. — The board of trustees of a common school district arranged with Stanton College, a Presbyterian institution, for two rooms in the building of the latter. The public school district board paid the two teachers who taught the sixth, seventh, and eighth grades. The other grades were taught by other Stanton College teachers. County high school pupils attended Stanton College, to which the county Board of Education paid out of the public school fund a tuition fee of two dollars a month per high school pupil. This arrangement was satisfactory to a large majority of the school patrons. Some, however, objected.¹ Evidence showed that the school was actually being conducted by Mr. Hanley, president of the college, and that bills for repairs and incidental expenses were paid to Stanton College by the public school board. The graded school district owned no school building.

Upon rehearing,² in which the earlier decision was reversed, the court held that the arrangement described above con-

¹ *Williams v. Board of Trustees of Stanton Graded School District*, 172 Ky. 133, 188 S. W. 1058 (1916).

² 173 Ky. 708, 191 S. W. 507 (1917).

stituted an appropriation of public funds for sectarian purposes and thus was in violation of the constitutional provision that "no portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school";³ and that any arrangement whereby a sectarian school is accepted as a public school is unconstitutional. The court took the position that the constitution of Kentucky provides for the complete separation of public and sectarian schools. The fact that the majority of the patrons approved of the arrangement did not make it constitutional.

Not only was it deemed a violation of the constitution to appropriate any part of the common school fund in aid of any "church, sectarian, or denominational school," but it was also declared unlawful for the trustees of any common or graded school to enter into a contract with any educational institution that is directly or indirectly under the influence, supervision, or control of any denominational or sectarian organization.

In holding that payment of tuition fees for high school pupils out of the public school fund was illegal, the court said:

we may with propriety say in passing that the admitted arrangement between the Board of Education of Powell County and Stanton College, under which Stanton College was created a county high school and paid by the Board of Education out of the common school funds tuition fees for county high school pupils, is a flagrant violation of Section 189 of the constitution. . . .

This denial of the right of school districts to pay tuition fees of high school students to sectarian institutions is similar to the position taken by the court of South Dakota.⁴ The constitution of that state specifies that

³ Constitution of Kentucky, Section 189.

⁴ Dakota Synod v. State, 2 S. Dak. 366, 50 N. W. 632 (1891).

No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.

that no part of the state school fund shall ever be diverted . . . or used for any other purpose whatever than the maintenance of public schools . . .

and that

No appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state . . .⁵

The court declared that these constitutional provisions forbid the payment by the state of the tuition of a designated class of students in a sectarian university for instruction in the methods of teaching in the public schools.

Massachusetts.— The question of whether or not the constitution prohibited money raised by taxation from being appropriated to maintain or aid any church, religious denomination or society, or any school wholly or in part under sectarian control was submitted to the justices of the court for an opinion.⁶ They answered that all money raised by taxation for the public or common schools must be used exclusively for the support of such schools, that it cannot be diverted to any other school maintained in whole or in part by any religious sect.⁷

In agreement with these court decisions of Kentucky and South Dakota and the opinion given by the justices of the court of Massachusetts was the decision of the Mississippi court⁸ that an act allowing children to receive the same share of a public fund for attendance at a private school of

⁵ Constitution of South Dakota, Article 6, Section 3; Article 8, Sections 3, 16.

⁶ In Opinion of Justices, 214 Mass. 599, 102 N.E. 464 (1913).

⁷ It was stated that there is no constitutional stipulation prohibiting appropriations for higher educational institutions, societies, or undertakings under sectarian or ecclesiastical control. Such prohibitions are limited to the common schools, which would undoubtedly include the grades and high schools.

⁸ *Otken v. Lamkin*, 56 Miss. 758 (1879). The court held that while the public schools of Mississippi were open to all children within the ages of five to twenty-one years, "this freedom of admission to all will not preclude the classifi-

a certain grade as for attendance in the public schools was a violation of the constitutional provision that

No religious or other sect . . . shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.⁹

While taxes may be authorized and, under certain conditions, levied for the maintenance of public institutions of learning, such levy must not be for private and sectarian institutions; and officers of a city have no right to impose a tax on the property of citizens in aid of private or sectarian schools.¹⁰

In 1933 many of the public school districts in Ohio, as in other states, found themselves in such financial difficulties that they were unable to carry on their school work. An effort to secure an appropriation of state funds for sectarian purposes was recently made. An appeal was made to the state legislature for special tax legislation to provide aid for these "weak school districts." A proposed amendment to the appropriation bill providing for the expenditure of \$2,000,000 of public funds for the operation of parochial schools in the state was defeated in the lower house by the narrow margin of three votes. In the special session called by the governor in 1934, the matter was again brought up by friends of the parochial schools. At that time \$5,000,000 was requested. While a strong church lobby seeking the passage of the bill tried to influence the legislators, an active campaign of opposition was carried on throughout the state, with the result that it was defeated.

The state constitution of Ohio provides that

cation of the schools according to the age, sex, race, or mental acquirements of the pupils—provided, only, that they remain free to all who come within the class to which the particular school is set apart."

⁹ Constitution of Mississippi, Article 8, Section 208.

¹⁰ In *Atchison, T. & S. F. R. Co. v. Atchison*, 47 Kans. 712, 28 Pac. 1000 (1892).

The General Assembly shall make such provisions, by taxation or otherwise, as, with the interest arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect or sects shall ever have any exclusive right to or control of any part of the school funds of this state.¹¹

It appears that when the state inaugurated the policy of general taxation for secular educational purposes only, it gave definite promise to its citizens, both religious and non-religious, that public funds should not be appropriated for other educational purposes than the teaching of secular studies in the public school curriculum, so that all might stand equal before the law. The infidel and the religionist would thus be assured of equal privileges under the law. The benefit the public may receive from the increase of schools and the spread of learning and knowledge does not warrant the appropriation of public funds to private or sectarian schools.

In some communities where the people are predominantly of a particular sect, appropriations are sometimes made to denominational schools by local officers, but such practice is illegal and if challenged must be prohibited. The courts are in general agreement in keeping church and school separate to the extent that no portion of the public school funds may be diverted to the support of schools which in their organization and conduct do not come within the general definition of "public schools." Public schools may be said to constitute a system of schools organized by the state; supervised by state, county, or local superintendent and school officers; and kept free from religious and sectarian control.

In New York a question arose regarding the legality of state aid to an orphan asylum under sectarian control.¹² The court held that an orphan asylum is neither a school nor an institution of learning; that the constitutional provision that

¹¹ Article 6, Section 2.

¹² *Sargent v. Board of Education*, 177 N. Y. 317, 69 N. E. 722 (1904), affirming 76 App. Div. 588, 79 N. Y. S. 127 (1902), which affirmed 35 Misc. 321, 71 N. Y. S. 954 (1901).

neither the state nor any subdivision thereof should give financial aid to any school or institution of learning wholly or in part under the control of a religious denomination, or in which any denominational tenet or doctrine is taught,¹³ had no application to an orphan asylum; and that state aid of a privately owned orphan asylum would be justified by the following constitutional provision:

Nothing in this constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents as to it may seem proper; or prevent any county, city, town, or village from providing for the care, support, maintenance, and secular education of inmates of orphan asylums, homes for dependent children, or correctional institutions, whether under public or private control. Payments by counties, cities, towns, and villages to charitable, eleemosynary, correctional, and reformatory institutions, wholly or partly under private control, for care, support, and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state board of charities.¹⁴

The court thus sustained the action of a city in paying the salaries of four teachers in St. Mary's Boys' Orphan Asylum as a contribution toward the secular education of the orphans in the asylum. It was shown that the education corresponded to that furnished to children in the public schools of the city. The asylum might be visited by the State Board of Charities. No denominational doctrine was taught, nor was any religious instruction imparted during the school hours prescribed by the State Board of Education.¹⁵

¹³ Constitution of New York, Article 9, Section 4.

¹⁴ *Ibid.*, Article 8, Section 14.

¹⁵ In New York it was held that where waterworks had been leased to a private concern for a term of years with the right to sell or rent water to private concerns or individuals, but with the provision that water should be furnished free to all "schoolhouses," no mention being made of whether these were private or public schools, the furnishing of such free water was not a violation of Article 9, Section 4, of the constitution, which reads: "Neither the state nor any subdivision thereof, shall use its property or credit or any public money . . . in aid or

In an earlier Illinois case ¹⁶ involving the appropriation of public funds to the Chicago Industrial School for Girls, it was held that the payment by Cook County for the tuition and maintenance of dependent girls committed to this school was prohibited by the constitutional provision which reads:

Neither the general assembly nor any county, city, town, township, school district, or other public corporation shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such corporation, to any church, or for any sectarian purpose.¹⁷

The Chicago Industrial School for Girls was a corporation. It did not conduct a school, nor did it own nor lease any building, but it placed the girls committed to it in certain institutions under the control of the Roman Catholic church. The payments, though made to the Chicago Industrial School, went in fact to the particular institutions to which the girls were committed. From the appropriations made, the girls received tuition and general maintenance, including board, room, clothing, and medical care.

This same institution was involved also in a more recent case.¹⁸ In this instance the court sustained a payment made to it. The institution was under the control and management of the Roman Catholic church and in charge of a mother superior. Religious services were held in a chapel on the grounds according to the doctrines of the church, and attendance of all the inmates was required. The sum paid for

maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." *St. Patrick's Church Society v. Heermans*, 124 N. Y. S. 705, 68 Misc. 487 (1910).

¹⁶ *Cook County v. Chicago Industrial School*, 125 Ill. 540, 18 N. E. 183 (1888).

¹⁷ Constitution of Illinois, Article 8, Section 3.

¹⁸ *Dunn v. Chicago Industrial School*, 280 Ill. 613, 117 N. E. 735 (1917).

each person was less than the amount required to maintain and keep a girl in a similar state institution. The payments were made only for girls of Catholic parents who were committed to the institution by the juvenile court.

In the two cases just cited the courts of New York and Illinois have in effect decided that a school conducted in connection with an orphan asylum owned and operated by a secular organization is not a "common school" and hence is not affected by the constitutional provisions prohibiting the appropriation of public funds to the support of any school or institution other than the common schools. In some states¹⁹—in New York, as we have seen—constitutional provisions as well as statutory law permit payments by counties, cities, or towns to such charitable, eleemosynary, correctional, and reformatory institutions wholly or in part under private or sectarian control. It is difficult to understand how a school conducted and maintained in connection with an orphan asylum is different from a grade school conducted in connection with some church or college, why one should be entitled to appropriations from the public funds any more than the other.

Nevada.—The Nevada Orphan Asylum, a Catholic institution, claimed money from the state. The controller, however, refused to draw the money on the grounds that it constituted an appropriation of public funds for sectarian purposes. The court held that the orphan asylum here in question was a sectarian institution, that the money sought would be used for sectarian purposes,²⁰ and that consequently the payment of it would be a violation of the constitution, which provides that "no public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes."

The court declared:

Under the provisions of our constitution, neither Christianity

¹⁹ See the constitution of Massachusetts, Article 3, Section 2.

²⁰ Constitution of Nevada, Article 11, Section 10.

nor any other system of religion is a part of the law of this state. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance simply because it is religion.

The position taken by the Nevada courts,²¹ which differs from that taken in the cases previously considered, may be said to be in more general agreement with the American principle of complete separation of church and state.²²

²¹ *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373 (1882).

²² Congress by statute authorized the incorporation of a hospital in the city of Washington for the care of such sick and incapacitated persons as might apply for care and treatment. The act set forth the powers and duties of the corporation. Subsequently Congress appropriated a sum of money for a building to be erected in connection with the above institution at the discretion of an administrative officer of the government. The officer decided that the building should be erected in connection with the hospital referred to. Complaint was brought in an effort to prevent the use of the money appropriated for this purpose on the ground that the proposed action would be a violation of the constitutional provision relating to the establishment of a religion. Though the hospital had accepted patients without respect to their religious faith, the members of the corporation were members of a monastic order of sisterhood of the church. In denying the petition the court held that so long as the hospital is managed in accordance with the statute of its incorporation, the fact that its conduct may be influenced by persons of a particular religious faith does not result in the establishment of any religion in violation of the first amendment to the constitution. *Bradfield v. Roberts*, 175 U. S. 291.

CHAPTER X

SCHOOL BUILDINGS

I. USE OF PUBLIC SCHOOL BUILDINGS FOR RELIGIOUS MEETINGS

THE STATUTORY provisions, as well as court decisions, in regard to the use of public school buildings for religious meetings vary in the different states. Some states specify that public school buildings may be used, at the discretion of the school board, for religious services outside the regular school hours if such use does not interfere with school programs.

In Illinois, for example, the statutes give to the board of school directors power to have the control and supervision of all public school houses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors may deem proper . . .¹

This statute was held to be constitutional by the Supreme Court of Illinois² in a case involving a school board that had granted the temporary use of a schoolhouse for religious meetings and Sunday schools. Since these meetings did not interfere with the regular school work, the court held, the authorization of them was not a violation of the Illinois constitutional provision that no person should be required to support a place of worship against his consent, nor preference be given to any religious denomination or mode of worship; nor did it constitute an appropriation in aid of any church or for sectarian purposes, nor the improper use of school

¹ Revised Statutes of the State of Illinois, 1931, Chapter 122, Section 123.

² *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879).

property.³ It was contended that the wear and tear on the building would be so little that any expense that might be passed on to the taxpayer as a result of such use would be "inappreciable," and that the constitutional provisions were not intended to prohibit religious organizations from receiving any incidental benefit whatsoever from the public bodies or authorities of the state.

In a Nebraska case⁴ it was held that the occasional use of a schoolhouse for Sunday schools and religious meetings over a period of five years and not more than four times in any one year did not make the schoolhouse a place of worship within the meaning of the constitution, nor did it constitute the improper use of public funds. Where, however, the statute has given the school directors authority to permit the use of school buildings for religious and other purposes, a church organization has no right to use the schoolhouse for religious meetings without permission from the school directors, and the directors may refuse such permission at their discretion.⁵

Other states leave the use of school buildings to be determined by a vote of the people in the district at their school meeting. In Iowa it was held that under a statute conferring authority on the electors of a school district to direct the sale or "other disposition" to be made of any schoolhouse, the school district has the power to permit by vote the use of such buildings for religious purposes.⁶ In another case it was held that the electors of a district township have power to order by vote that a schoolhouse be opened for Sabbath school, religious worship, and lectures on moral and scientific subjects at such times as will not interfere with the regular progress of the public schools.⁷

In Indiana, where a statute permits the use of a school-

³ Constitution of Illinois, Article 2, Paragraph 3; Article 8, Paragraphs 2, 3.

⁴ State ex rel. Gilbert v. Dilley, 95 Nebr. 527, 50 L. R. A. (N. S.) 1182 (1914).

⁵ School Directors v. Toll, 149 Ill. App. 541 (1909).

⁶ Townsend v. Hagen, 35 Ia. 194 (1872).

⁷ Davis v. Boget, 50 Ia. 11 (1878).

house for other than school purposes "when unoccupied for common school purposes," the court defined the period of occupation for school purposes as extending from the beginning of the school term to its end, including school days, Saturdays, Sundays, and nights, and held that therefore a school trustee might not grant the use of the school building for religious purposes during this time.⁸ If such permission was to be granted at all, it might be granted only for the summer vacation period.

A number of states have held that in the absence of express authority a school board cannot permit the use of a school building for religious meetings.⁹ Funds to erect such buildings are raised by taxes, and money so raised cannot be used for a private purpose nor to build a place for a religious, political, or social society. That which cannot be done directly cannot be done indirectly. If it is not permissible to levy taxes to build a church, neither is it permissible to levy taxes to build a schoolhouse and then lease it for a church. Though no immediate perceptible injury may result, the school building has been used for purposes for which it was not designed.¹⁰

In Massachusetts the court declared void an attempt by the voters of a school district to authorize taxes for the purpose of building an elaborate school building that might be an ornament in the community and at the same time serve as a meeting place for lectures, exhibitions, or religious services.¹¹

In Connecticut the court said that it would not consider void the vote of a district directing the erection of a schoolhouse merely because the school district authorized religious meetings to be held in it in the evening, but that it might

⁸ *Baggerly v. Lec*, 37 Ind. App. 139, 73 N. E. 921 (1905).

⁹ *Dorton v. Hearn*, 69 Mo. 301 (1878).

¹⁰ *Spencer v. School District*, 15 Kans. 259, 22 Am. Rep. 268 (1875); *Hysong v. Gallitzin School District*, 164 Pa. 629 (1894); *Bender v. Streabich*, 17 Pa. Co. Ct. 609 (1896); *Spring v. School Directors*, 31 Pittsb. L. J. N. S. (Pa.) 194 (1900).

¹¹ *George v. Second School District*, 6 Met. (Mass.) 510 (1843).

under certain conditions prohibit the use of the schoolhouse for improper purposes.¹² This decision, however, was reversed by the Connecticut court two years later, when it was held that in spite of the favorable vote of a certain school district the school committee did not have the power to grant the use of a schoolhouse of the district for religious meetings, Sunday school, or other religious services, and that upon the objection of a taxpayer of the district an injunction might be issued against such use, even though the injury to the schoolhouse or other property might be very slight, or even negligible.¹³ This practice has come to be known as the "Connecticut rule" for use of schoolhouses.

II. USE OF SECTARIAN BUILDINGS FOR PUBLIC SCHOOL PURPOSES

With few exceptions the courts have been in general agreement that the use of a portion of a church or other sectarian building for school purposes and the payment of rent therefor does not constitute an appropriation or aid to the church or sectarian school within the meaning of constitutional prohibitions against such aid, especially where the use of the sectarian building is temporary, arising from an emergency.

That the temporary use of a room in a church edifice for public school purposes in an emergency does not constitute an interference with the religious rights of children compelled to attend for public school instruction was the decision of the Illinois court in 1887 and of the New York court in 1921.¹⁴

In Illinois a school district had voted down a proposition to erect a new schoolhouse. The board had rented the basement of a Catholic church for public school purposes, de-

¹² *Sheldon v. Centre School District*, 25 Conn. 224 (1856).

¹³ *Scofield v. Eighth School District*, 27 Conn. 499 (1858).

¹⁴ *Millard v. Board of Education*, 121 Ill. 297 (1887); *In the Matter of Roche*, 26 N. Y. St. Dept. Rep. 217 (1921).

claring the act to be an emergency measure. The teachers hired were Catholics, and the Catholic pupils were required to attend mass upstairs in the church before the opening of school. The teachers and the Catholic pupils who wished to do so studied the catechism upon returning to the schoolroom a half hour before the opening of school, and at noon teachers and students prayed the Angelus in the schoolroom. Complaint was brought by a school patron and taxpayer. None of the pupils had objected to the study of the catechism or the prayers. The court held that the Board of Education was empowered to rent for public school purposes the basement of the church controlled by the Catholic denomination. It did not appear that the complainant had any children who were required against his wishes to attend or receive any religious instruction. No religious exercises were required.¹⁵

In a New York case the high school building had burned, and the Sunday school room of the Christian Church was used as an emergency measure. A number of Catholic children in the eighth grade were required to attend for instruction, this grade having been assigned to the Christian Church chapel. There was no visible evidence of sectarian influences other than a report of the Sunday school classes on the wall, nor was it shown that any religious instruction of any kind took place.

In Tennessee the court said that while it is contrary to law and public policy to allow the public school money to be invested in property in which any religious denomination or society has any rights or interest,¹⁶ this does not prevent school directors, when necessary, from using a building of a parochial character if the trustees consent, or from making any suitable arrangement for the renting and occupation of a building for the use of the public schools.

The Iowa court has taken a similar position, as has that of

¹⁵ Millard v. Board of Education, *supra*.

¹⁶ Swadley v. Haynes, 41 S. W. 1066 (1897).

Texas.¹⁷ In 1918, however, the Supreme Court of Iowa held that when the board of directors of the public school, having appropriated money for and conducted a school in the upper room of a parochial school building adjoining the Catholic church to save the expense of repairing the public school building, which was in poor condition, and having employed a sister of a religious order who was in charge of the upper room of the parochial school, the board had thereby converted the public school into a sectarian or religious school contrary to the laws of the state, and that the appropriation of money for the support of such a school constituted an illegal use of public funds.¹⁸ Here the study of the catechism and religious instruction were a part of the daily program of the school. On the walls were pictures of the Holy Virgin. The teacher was dressed in a religious garb. The same program that had been carried on in the parochial school was continued after the schoolroom had been taken over by the school district. It was, the court said, "as thoroughly and completely a religious parochial school as it could well have been had it continued in name . . ."

The court further said:

The law does not prescribe the fashion of dress of man or woman; it demands no religious test for admission into the teacher's profession; it leaves all men to worship God or to refrain from worship according to their own consciences; it prefers no one church or creed to another. This principle of unfettered individual liberty of conscience necessarily implies—what is too often forgotten—that such liberty must be so exercised by him to whom it is given as not to infringe upon the equally sacred right of his neighbor to differ with him. . . . If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, sup-

¹⁷ *Scripture v. Burns*, 59 Ia. 70, 12 N. W. 760 (1882); *Nance v. Johnson*, 84 Tex. 401, 19 S. W. 559 (1892).

¹⁸ *Knowlton v. Baumhover*, 182 Ia. 691.

ported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly, for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.¹⁹

The Iowa court, in quoting the Ohio state Supreme Court in the case of Board of Education of Cincinnati v. Minor,²⁰ said:

"True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. . . . True Christianity never shields itself behind majorities. . . .

*Legal Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself."*

In Wisconsin a school district had for some twenty years rented from the Roman Catholic church certain rooms in its school building adjoining the church building.²¹ In these rooms was conducted the public school of the district, for which had been expended the school money of the district. In addition to the rent, small sums had been paid for fuel, cleaning, and the like. The rooms not rented by the district were used for a parochial school. In the rooms used for the public school certain religious exercises were conducted. Prayers were offered at intervals during the day, and church hymns were sung. The pupils regularly attended religious services in the adjoining church before school hours. Fre-

¹⁹ The North Dakota case, *Pronovost v. Brunette*, 36 N. Dak. 288, 162 N. W. 300 (1917), had to do with the religious question of leasing a room in a Catholic institution by the public school district. The court, however, did not decide the case upon the religious phase of the question but based its decision on the ground that the board had no authority to lease a building from anyone, as prohibited under the educational laws of the state, since there was in existence sufficient school room for all its purposes.

²⁰ 23 Ohio St. 211 (1872).

²¹ *Dorner v. School District No. 5*, 137 Wis. 147, 118 N. W. 353 (1908).

quently children were dismissed to attend weddings and funerals in the church. The teachers wore religious garb. With the exception of one or two of the pupils all were children of Catholic parents.

The court held that the school had been pervaded by sectarian instruction contrary to law and granted an injunction against its continuance. The court took the position that the school district and board had power to rent rooms for the maintenance of a distinctly public school, the selection to be at the discretion of the school board. The money paid could not be recovered either from the board or the church, as such actions were known of and voted at the annual school district meeting.

In the same state objection was made to the holding of graduation exercises of the public high school in a church, and to the practice of inviting ministers or priests to offer prayer at these exercises.²² No charges were made for the use of the churches, nor were the clergymen paid for giving the invocations. The prayer was allegedly free from sectarianism, and graduates were not compelled to attend the exercises. While the court held that none of the rights guaranteed by the constitution had been violated, it deemed that it would be a wise exercise of official discretion to discontinue such practice if there were a sufficient number of complaints. Inasmuch as no appropriations of school money were involved, the only question here was whether or not this practice forced persons to attend a place of worship against their consent and thus interfered with the rights of conscience. Graduation exercises, being a part of the school curriculum, are under the direction and control of school boards, and since they are, the school boards cannot escape the responsibility for them. Parents and pupils of all denominations have a right to attend such exercises without having their legal rights invaded, but the court considered that it would

²² State ex rel. Conway v. District Board of Joint School District, 162 Wis. 482, 156 N. W. 477 (1916).

be "far-fetched" to say that by voluntarily attending such services one is compelled to attend a place of worship. It considered the complaint about prayers offered at graduation exercises by denominational clergymen a somewhat different question in that a prayer might be either sectarian or non-sectarian in character. The prayer here complained of was nonsectarian, however, and the court concluded by saying:

Pupils do not congregate on such an occasion for the purpose of worship, and the short nonsectarian invocation that is usually given is a mere incident which occupies but a few moments. . . . A very different question would arise if an attempt were made to introduce the practice of having prayer as part of the daily routine in our public schools.

CHAPTER XI

TEACHER EMPLOYMENT

I. EMPLOYMENT OF SECTARIAN TEACHERS

THE RULE that "no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil"¹ may now be said to be the general principle accepted by the public school systems of all of the states. This principle does not justify teachers in conducting themselves in a way that is inconsistent with good order, peace, morality, or the safety of the state. It prevents a teacher from being refused employment because of his religion, but it does not prevent him from being refused employment or even dismissed because of views and beliefs based on his religion which may hinder him from discharging properly the duties he has assumed as a teacher in the public schools.

In 1918 a case involving this question came to the attention of the courts in the state of New York.² A school teacher who was a Quakeress had been dismissed. She was opposed to war and to the existing war with the German government. She would not urge nor help her pupils to support the United States government in carrying on the war with Germany. She did not participate in Red Cross activities nor buy thrift stamps, nor did she believe that a teacher was under obligation to support governmental measures for carrying on the war. She charged that her dismissal was a violation of the federal and state constitutions on the ground that she had been discriminated against on account of her religion, that this was an attempted restraint upon the Quaker faith.

¹ Constitution of Arizona, Article 11, Section 7.

² McDowell v. Board of Education, 104 Misc. 564, 172 N. Y. S. 590 (1918).

The court, which sustained the dismissal, said that the petitioner was not discriminated against because she was a Quakeress, but because her views and beliefs, which she claimed were based upon her religion, prevented her from discharging properly the duty she had assumed.

Where a person agrees with the state to perform a public duty, she will not be excused from performance according to law merely because her religion forbids her doing so. While the petitioner may be entitled to the greatest respect for her adherence to her faith, she cannot be permitted because of it to act in a manner inconsistent with the peace and safety of the state.

The statute under which she was removed provides that a teacher shall hold her position

during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing by the affirmative vote of a majority of the board.³

The court held that the Board of Education had jurisdiction to entertain the charges against the petitioner and that it was within the exercise of their discretion to remove her from her position, her only recourse being that of an appeal to the commissioner of education.

The fact that a teacher may have been teaching in a parochial school does not prevent such a person from being employed in the public school. The Kentucky⁴ court held that a teacher's resignation from a church school to become a teacher in a state graded school did not constitute a violation of the law, despite the fact that two other church school teachers became teachers in the graded school but were paid by the church school. In this instance, however, the school had burned down and the steps taken were merely a temporary measure. The court held that the arrangements made did not constitute a union of the church school with the public school.

³ Educational Law, Section 872, as amended by Chapter 786, Section 1, Laws of 1917.

⁴ McDonald v. Parker, 130 Ky. 501, 110 S. W. 810 (1908).

A clear separation of church and state and the disregard of religious and nonreligious affiliations have not always been observed in the hiring of teachers. In Illinois ⁵ the court said, "The statute has not prescribed any religious belief as a qualification of a teacher in a public school. The school authorities may select a teacher who belongs to any church or no church, as they may think best."

Until 1833 the constitution of Massachusetts prescribed that each town, precinct, parish, etc., should have a Protestant teacher of piety, religion, and morality who was elected by some incorporated religious society. The court ruled ⁶ that a teacher of an unincorporated religious society could not be regarded as a public Protestant religious teacher and therefore was not entitled to any part of the funds raised by a town, parish, precinct, etc., for such a teacher. We should be astounded if any court should hand down such a decision today and yet such must be the result if we permit those practices which actually make for the adoption of a state religion and fail to keep church and state forever separate.

II. WEARING OF RELIGIOUS GARB BY PUBLIC SCHOOL TEACHERS

In 1894 the courts of Pennsylvania tried the case of *Hyson v. Gallitzin School District*.⁷ This was an action brought by resident taxpayers to prevent the employment of sisters of charity in the Gallitzin public schools. The public school board had been employing four such sisters of charity, who wore while teaching the garb, insignia, and emblems of their order. There was no evidence of any religious instruction or exercises during the school hours. After school was out, Catholic children were required to remain to study the catechism.

The questions brought to the court were whether the exclusion of a sister of charity from employment as a teacher

⁵ *Millard v. Board of Education*, 121 Ill. 297, 10 N.E. 669 (1887).

⁶ *Barnes v. Falmouth*, 6 Mass. 400 (1810).

⁷ 164 Pa. St. 629 L. R. A. 203.

because she wore a religious garb in the public schools would be a violation of the religious liberty guaranteed in the Bill of Rights of the constitution of Pennsylvania,⁸ and whether the wearing of such religious garb and insignia by the teacher constituted sectarian teaching. The court held that the exclusion of such teachers from the public schools would be a violation of the religious liberty guaranteed to them in the constitution, and that the wearing of the religious garb did not constitute sectarian teaching.

Mr. Justice Williams, in a dissenting opinion, said:

This is not a question about taste or fashion in dress, nor about the color or cut of a teacher's clothing. If it was only this I would favor the largest liberty.

They come into the schools not as common school teachers, or as civilians, but as the representatives of a particular order in a particular church whose lives have been dedicated to religious work under the direction of that church.

The next year the legislature of Pennsylvania passed an act prohibiting the wearing of such garbs in any public school and making liable to fine any board of directors who should violate the provision.⁹ The statute prohibited the teacher from wearing such garb only "in said school or whilst engaged in the performance of his or her duty" as a teacher. Fifteen years later, in 1910, when the case of *Commonwealth v. Herr*¹⁰ was brought before the court, the constitutionality of the act was upheld.

In 1906 a case was brought before the Court of Appeals, the highest court in New York, which affirmed the decision of the Appellate Division of the Supreme Court in an action brought by Nora O'Connor and Elizabeth E. Dowd, public school teachers having proper certification but members of the Sisterhood of St. Joseph and wearing religious garbs,

⁸ Constitution of Pennsylvania, Bill of Rights, Article 1.

⁹ Purdon's Pennsylvania Statutes, Title 24, Sections 1129, 1130 (Laws of Pennsylvania, 1895).

¹⁰ 229 Pa. St. 132 (1910).

against Hendrick,¹¹ trustee of the school district, for unpaid salary. The salary of the sisters had been withheld because they had disregarded the state superintendent's order against the wearing of distinctive religious garbs in the schoolroom. The school trustee and defendant had permitted the sisters to continue teaching contrary to the order of the superintendent.¹²

It was held that the order of the state superintendent prohibiting the wearing of the religious garb while engaged in the work of teaching was a reasonable and valid exercise of the power conferred upon him, not because of the religious convictions or membership of the wearers of such apparel but because the influence of such apparel is distinctly sectarian. The court took the position that while no actual doctrine was taught, there was a violation of the following constitutional provision:

Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.¹³

Here we have the plainest possible declaration of the public policy of the state as opposed to the prevalence of sectarian influences in the public schools . . . There can be little doubt that the effect of the costume worn by these Sisters of St. Joseph at all times in the presence of their pupils would be to inspire respect

¹¹ O'Connor v. Hendrick, 184 N. Y. 421.

¹² In an earlier decision in a case involving this same school (the Ferris-Sylvester decision, 1902) the school board was ordered to discontinue the renting of "Brendan Hall," a building owned by the Catholic church and used by the district as a school building, and to tax the district and build a new building if necessary. The board had contended that the public school building was too small and it was on these grounds that it rented the above hall. With some reluctance they moved back into the district school but continued to employ the sisters to teach, and these continued to wear their religious garb. The O'Connor v. Hendrick case was a result of the superintendent's order prohibiting the wearing of such garb.

¹³ Constitution of New York, Article 9, Section 4.

if not sympathy for the religious denomination to which they so manifestly belong. To this extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine.

The court allowed the teachers their salaries up until the time when they were notified not to wear the garb any longer.

In 1919 Nebraska passed a law prohibiting any teacher employed in any public school of the state from wearing in said school "while engaged in the performance of his or her duty any dress, or garb, indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination . . ." ¹⁴ Any teacher who violated this provision was guilty of a misdemeanor. In 1923 the state of Oregon passed a similar act. ¹⁵

These cases seem to be indicative of the attitude of the courts with reference to the wearing of religious garbs by public school teachers. In not a single recent case has the wearing of a religious garb been upheld; as we have seen, in the case of *Hysong v. Gallitzin School District* ¹⁶ the state legislature of Pennsylvania nullified a court decision which upheld the practice by passing a statute prohibiting the wearing of such religious garbs and insignia, and the constitutionality of the statute has been upheld by the courts. ¹⁷

There have been few court decisions relating to this practice, and there are few statutes prohibiting it. Those that do exist seem to be in harmony with the present practice. ¹⁸ Even

¹⁴ Compiled Statutes of Nebraska, 1929, Chapter 79, Section 1417.

¹⁵ "After the passage of this act, it shall be unlawful for any teacher in any public school in the state of Oregon to wear in said school, and while engaged in the performance of his or her duty, any dress or garb of any religious order, sect, or denomination." Oregon Code, 1930, Section 35-2406 (Law of 1923).

¹⁶ *Supra*.

¹⁷ *Commonwealth v. Herr, supra*.

¹⁸ Just as this book was going to press a decision was handed down by the District Court of North Dakota in the case of *Olson v. Manheim School District No. 7*. The Manheim School District No. 7 is a consolidated public school in the village of Balta in the county of Pierce, created and existing under the laws of the state of North Dakota, its operating expenses being maintained entirely by taxes levied upon the property of said district. The school board, who were the defend-

where no court decision or statutory provision specifically prohibits the wearing of religious garbs, insignia, and emblems by teachers in the public schools, the practice is prohibited on the ground that the influence exerted by the wearing of such apparel is sectarian and thus contrary to statutory provisions prohibiting sectarian influence in the public schools.¹⁹

ants in this case, discharged in the summer of 1933 their former secular teachers and employed exclusively as teachers sisters or nuns in an established sisterhood of the Roman Catholic church, who were known by the names given them by the order to which they belong; namely, Sister Mary Benedict, Sister Mary Concepta, Sister Mary Stanislaus, and Sister Mary Aquin. The court found that the teachers wore the garb, hood, and insignia of the order to which they belong; that the wearing during school hours of this distinctive religious garb showing their membership in a special order of the church, the use of their church names, and other obligations of their vows, require them to so demean themselves as to create a sectarian influence which constituted a sectarian school.

The court ordered that an injunction be issued restraining the defendants from employing teachers who wear the garb or dress of a religious organization or indicating membership in such an order during school hours, and that the plaintiff be entitled to recover the cost of the action. Special provision was made whereby these teachers might finish out the school year in order not to cause disturbance by immediate dismissals. This provision was that the school board should employ and pay out of school funds a teacher to teach certain Protestant children, of whom there were three, who had not attended the school because of the sectarian influences, the said teacher to begin at once, to teach through the remainder of the school year and during the summer until the opening of school in the fall, in an effort to make up what the children had lost by their absence from school.

This is probably the latest case to appear in our courts over the subject of the wearing of religious garb in the public schools. The decision was handed down on March 14, 1934. While this was the decision of the state District Court, it is not likely that the case will be appealed to the Supreme Court.

¹⁹ The arguments against the wearing of religious garb as a sectarian influence were well stated by Robert G. Valentine, commissioner of Indian affairs, in the hearing before Secretary Fisher on the wearing of religious garb in government Indian schools. See page 207.

CHAPTER XII

PARENTAL CONTROL

THE QUESTION of just where the right of the state ends and that of the parents begins has been the crux of several court cases. Significant among them is the case of *Meyer v. Nebraska*. In 1919 the Nebraska legislature passed the following law, violation of which constituted a misdemeanor:

Section 1. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Section 2. Languages other than the English language may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade . . .¹

In the same year the legislatures of two other states, Iowa² and Ohio,³ passed similar statutes. In all three states cases

¹ Nebraska Laws, 1919, Chapter 249.

² The Iowa statute reads as follows:

"Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

"Section 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00)."

³ The Ohio statute reads:

"Section 7762-1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors, and such other officers as may be in control shall cause to be taught in the elementary schools all the branches named in Section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

"Section 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that

were immediately carried to the court,⁴ which in every instance upheld the constitutionality of the law.

In Nebraska the act was applied to a parochial school which had disregarded its provisions by holding an extra session between the regular morning and afternoon classes for instruction in the German language. It was charged that the law interfered with both personal and religious liberty and with the right of parental control. It was maintained that in many localities it was necessary for a child to have a knowledge of the German language in order to understand the church services, and to receive religious instruction from a parent in the home who spoke the German language.

The Nebraska Supreme Court upheld the constitutionality of the statute as "reasonably within the police power of the state." In so doing, the court ignored the fact that the statute prohibited instruction in a foreign language by the parent as well as by the school teacher, either in or out of school hours. The state court held:

The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners who had taken residence in this country to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners who had emigrated here to be taught from early childhood the language of the country of their parents was to rear

prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees, or officers in control shall cause to be taught in them such branches of learning as prescribed in Section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

"Section 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense."

⁴ *Bartels v. Iowa*, 191 Ia. 1060, 181 N.W. 508 (1921); *Bohning v. State of Ohio*, 102 Ohio St. 474 (1921); *Pohl v. State of Ohio*, 102 Ohio St. 474, 132 N.E. 20 (1921); and *Meyer v. State of Nebraska*, carried to the Supreme Court of the United States, 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. ed. 1042 (1923).

them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language, and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.

It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state, and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens except those of foreign lineage. Other citizens, in their selection of studies, except, perhaps, in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence.

Mr. Justice Letton in a dissenting opinion, which was concurred in by Chief Justice Morrissey, conceded the right of the state to control curricula of the public schools, that is, schools supported by public taxation, and even the right to place private and church schools under state supervision and to require for these schools "the same general standards." He maintained, however, that the state has no right to pre-

vent parents, after they have given their children the branches of education required by the state, from giving to them a "full measure of education" in addition to the state requirements, whether at home or in a private school.

Meyer, being convicted of violating the statute in that he unlawfully taught the subject of reading in the German language to a pupil who had not completed the eighth grade, carried the question to the Supreme Court of the United States, charging that the statute, as construed and applied, unreasonably infringes the liberty guaranteed by the fourteenth amendment: "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." ⁵

The opinion of the United States Supreme Court, which declared the Nebraska law unconstitutional, pointed out that a state can determine the curricula of its own schools. It may reasonably regulate all schools to the extent of inspecting, supervising, and examining them, including teachers and pupils. The state may require attendance at some school. It may also require certain studies essential to good citizenship.

While the court did not define the liberty guaranteed by the fourteenth amendment, it concluded that the protection given

denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

A knowledge of the German language was not regarded as harmful, and the Nebraska statute was declared to be unreasonable in that it deprived the parents of the reasonable control of their children. The right of parents to engage a teacher thus to instruct their children was declared to be within the liberty guaranteed by the amendment. Mr. Justice

⁵ Constitution of the United States, fourteenth amendment, Section 1.

McReynolds, who delivered the opinion of the court, said in part:

The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquillity has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. . . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition, with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals, or understanding of the ordinary child.

Thus the case of *Meyer v. State of Nebraska* is one of the comparatively small number of cases in which, in applying the fourteenth amendment, the Supreme Court of the United States has overruled the decision of a state court and of a state legislature, in this instance repudiating a statute because it was an unwarranted interference with parental control.⁶

⁶ The decision in the case of *Meyer v. Nebraska* does not conflict with the opinion rendered in the case of *Berea College v. Commonwealth*, 29 Ky. L. 284, 94

The *Illinois Law Review* points out that the question may still be raised, however, as to whether a state might require so many specific subjects as to leave no room in the curricula for elected subjects—religious as well as other subjects desired by the private school. In reality it would result in the state filling the entire curriculum with subjects deemed essential to good citizenship, thereby requiring them to be taught in both public and private schools and leaving no room for electives. The Nebraska case does not cover this question, and the decision leaves it open.⁷

It is quite reasonable to assume, however, that the doctrine of "reasonableness" would undoubtedly come into play, for, as Mr. Justice McReynolds suggests, liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts.⁸

Another important case relating to this general subject of parental control resulted from a statute enacted by the legislature of Oregon in the autumn of 1922, known as the Compulsory Education Act.⁹ This law directed all parents, guar-

S. W. 623 (1906), to the effect that a state may apply to both the public and the private schools its general policy of segregation on the ground of public and race welfare, and may prevent intermarriage of white and colored persons and the immorality which such associations frequently engender.

⁷ "Teaching of English Language in Schools," *Illinois Law Review*, 18:394 (1924). See also Charles J. Turck, "State Control of Public School Curriculum," in *Kentucky Law Journal*, 15:277-98 (May, 1927).

⁸ An Indiana statute provided for the teaching of a designated foreign language provided the parents of twenty-five or more children should request it. The court said: "With reference to the act under consideration, we are of the opinion that when the requisite demand is made it becomes the duty of the board of school commissioners to introduce the German language as a study into the particular school where it is demanded . . ." The court held that the school board had "no discretion to refuse, but must act." *School Commissioners of Indianapolis v. State ex rel. Sander*, 129 Ind. 14.

⁹ The act reads as follows: "Any parent, guardian, or other person in the state of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neg-

dians, and others having charge of children between the ages of eight and sixteen to send such children, with certain exceptions, for a full term to the public school of the district where the children resided. The purpose of the law was to close all private and church schools. The operation of the law was postponed until September 1, 1926.¹⁰ In the meantime its provisions adversely affected the operation of private and church schools in the state. In many instances guardians of children desired to place their children in private schools for a term of years, but, expecting such schools to be closed, hesitated to do so.

In the case of *Pierce v. Society of Sisters*¹¹ the Supreme Court of the United States held the Oregon statute unconstitutional because it interfered unreasonably with the liberty of parents and guardians to direct the education of the children under their control, and because it violated the rights of denominational and private schools. The right to liberty and property guaranteed by the fourteenth amendment to the federal constitution, the court maintained, involves not merely the right of parents to educate their children where they please but also the right of private and denominational schools to solicit students for their schools unhampered by legislative interference. The court pointed out that the schools engaged in the work here complained of were "engaged in

lect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases, children shall not be required to attend public schools:

- (a) Children Physically Unable.
- (b) Children Who Have Completed the Eighth Grade.
- (c) Distance from School.
- (d) Private Instruction.

Oregon Laws, 1923, Chapter 1, Section 5259.

The foregoing act was proposed by initiative petition, filed in the office of the secretary of state on July 6, 1922, and approved by a majority of the votes cast thereon at the general election held on November 7, 1922. There were 115,506 votes cast for the act and 103,685 against it.

¹⁰ *Ibid.*

¹¹ 268 U. S. 510, 45 Sup. Ct. Rep. 571, 69 L. ed. 1070 (1925).

a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state." The state does not have the power to standardize its children by forcing them to accept instruction at the hands of public teachers only, for, declared the court, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The rights of parenthood are inherent. These rights may be said to supersede all others. To the parent must be given the right to teach his child or send him to a school where he may be taught the principles the father wishes for him. This is not only the privilege of the parents but their responsibility. It stands to reason that no autocratic power—exercised either by a single individual, by men gathered in a legislative body, or by public vote—can ever by lawful means deprive the parent of this right. Tyranny may trample it under foot, but justice still confirms it.

Election day, November 4, 1924, witnessed for the second time within four years the defeat of a proposal, similar to the Oregon law, to close private and sectarian schools in the state of Michigan. The agents responsible for the proposal were said to belong to an organization known as "The Public Schools Defense League" with headquarters in Detroit. The proposal took the form of a constitutional amendment which read as follows:

Section 16. From and after August 1, 1925, all children residing in the state of Michigan between the ages of seven years and sixteen years shall attend public school until they have graduated from the eighth grade.

Section 17. The legislature shall enact all necessary legislation to render said Section 16 effective.

At the time the above constitutional amendment was up

for consideration in Michigan, the Oregon case was pending in the United States Supreme Court.

The advocates of the proposed amendment conducted a strong campaign, exhibiting in some instances considerable bitterness of spirit. They claimed that they were champions of Americanism and that the best interests of the nation depended upon confining the education of all children to the public schools. The real and overshadowing object of the movement was religious, to judge from the literature and platform propaganda of the promoters, who reasoned that the only way by which the progress of the Roman Catholic church could be checked or destroyed was to close its schools.

The interest in the campaign is evident from the results of the election as published by Secretary of State Charles J. Deland. There were 760,571 votes against and 421,472 for the amendment, making a total of 1,182,043 votes. The presidential vote was 1,160,918, and the vote for the governor totaled the same. Thus 21,125 more votes were cast on the amendment than on any other question in the campaign. There was a majority vote of 339,099 against the amendment.

The case of *Pierce v. Society of Sisters*¹² is an interesting sequel to *Meyer v. Nebraska*,¹³ in which, though it seems to have been conceded that the state can dictate the curricula of its own tax-supported schools and to some extent that of private schools as well, the Supreme Court of the United States held that it may not exercise the latter power unreasonably, nor interfere unreasonably with parental control.¹⁴

Taken together, the cases seem to advance the doctrine that the state may require its children to be taught morality and loyalty, and may require a general knowledge of the English language and of our national constitution and government. It must, however, leave it to the parents to determine where the education is to be had and what the nature

¹² *Supra*, p. 179.

¹³ *Supra*, p. 173.

¹⁴ Andrew A. Bruce, "Right of Parental Control," *Illinois Law Review*, 20:378 (1925).

of the education shall be. A private or parochial school may complain if its supply of students is cut off by an illegal statute; consequently a statute unreasonable either with regard to parents or to private schools is invalid. Thus voluntary agencies are given the right to dip into the common reservoir for students just as employers may do for laborers.¹⁵

As a precedent these cases open the door for a large measure of judicial control and may be said to repudiate what until recently was believed by some to be the growing, if not the established, rule that the reasonableness of and the necessity for a state statute are for the determination of the state legislatures and state courts. The course taken by the Supreme Court would seem to be in harmony not only with former decisions but with our general principles of government.

In the case of the Oregon school law, for instance, it would hardly seem that the promoters realized what such a course would mean to our educational work and what it would mean to thousands of children. There are many such schools and great numbers of children attending them. These schools are conducted and maintained by both Protestants and Catholics. The public treasury is not drawn upon to erect buildings nor to pay the salaries of the teachers. There may be some exceptions, but they are few.

Our public school system has earned the confidence of the people, and consequently they should support it unstintingly with their taxes. But the very essence of our democracy forbids religious instruction in the state schools. Such a thing is impossible without setting up a state religion. Many parents, of course, desire to have their children taught religion at the same time that they are being taught the common branches. When such parents have paid their taxes for the support of the public schools, they have a right to maintain at their own expense schools wherein their children may be

¹⁵ *Truax v. Raich*, 239 U.S. 33 (1915); *Truax v. Corrigan*, 257 U.S. 312 (1921); and *Terrace v. Thompson*, 263 U.S. 197 (1923).

taught what they wish to have them taught. To decide where and how the child shall be educated is a parental prerogative so long as the parent provides for the child the standard intellectual instruction necessary for good citizenship.

Our forefathers came to America that they might be free to practice their religion and to teach it to their children. Many of their descendants still desire this right. It should not be denied them. It has been said that American democracy has been built upon four cornerstones—freedom of speech, freedom of the press, freedom of religion, and freedom of education. To maintain our democracy these cornerstones must not be removed.

Former Vice-President Marshall enunciated an important principle when he said:

Unless I develop into such a brute as to be unable to take care of my child and thus warrant society in removing him permanently from my custody, I should be let alone to look after his health, care for his wants, guide his education, and instill into his mind such religious views as I think will enable him to stand against the temptations of a tempestuous world.

One of the great values of private schools lies in their differences. State institutions must necessarily be of a somewhat similar pattern. There is constant pressure to make all things uniform. In order to maintain our present standing and, above all, to develop, we must have among us both individuals and institutions that have the courage of their convictions and that dare to be different. This has been true of the private schools. From these schools have come many of the leaders in educational reform and many of our greatest statesmen. Thus it can hardly be said that these institutions have been a detriment; rather they have been an asset.

It may well be summed up in the words of the Honorable P. P. Claxton, former United States commissioner of education:

We believe in the public school system. It is the salvation of our democracy; but the private schools and colleges have been

the salvation of the public schools. These private institutions have their place in our educational system. They prevent it from becoming autocratic and arbitrary, and encourage its growth along new lines.

Some have contended that it is our public educational system that must set the standards that should govern the moral, social, and mental development and training of our youth. That, of course, is the Spartan theory of education. That theory has been combated by our American courts. The laws pertaining to education and school rules and regulations must be observed, but the school, whether it be public or private, is not the sole developer of the child's character. It occupies a secondary position. It is simply an aid, though a valuable one, to be sure, to the desired end. The parents are the responsible factors. They may delegate this primary responsibility to no one. Only when they fail may the state interfere.

The American courts have at all times protected and perpetuated this right, a right which is in many ways peculiar to the American nation—a right which guarantees to everyone the freedom to worship or not to worship God in the manner he desires, so long as he does not imperil the public safety and morals. The Nebraska German language case and the Oregon school case both sustain this position.

CHAPTER XIII

STATE CONCERN WITH PRIVATE SCHOOLS

I. TRANSPORTATION OF PUPILS TO OTHER THAN PUBLIC SCHOOLS

DIFFICULTIES occasionally arise over the question of transportation of children to private or parochial schools. Frequently the public school bus passes the very doors of the homes of children who attend a parochial school adjoining or but a short distance from the public school. Parents feel that they are being taxed for the support of the public school bus, and that therefore it makes no material difference whether the children are transported to the public school or are permitted to ride along and get out at the private or parochial school. In some cases such privileges of transportation have been granted in a nonofficial way. In others arrangements have been made with the bus driver to carry these children for a small additional charge, and in still others such transportation has been refused.

In Wisconsin a controversy¹ arose as to whether or not the public school district should pay for transporting children to a parochial school. At a special school board meeting a resolution was passed authorizing the district school board to enter into a contract for the transportation of children of school age from any point in the district to any point agreed upon, and for the payment of the cost of such transportation out of the public school fund.

The constitution of Wisconsin and her statutes provide that

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable;

¹ State ex rel. Van Straten v. Milquet, School District Treasurer 180 Wis. 109, 192 N. W. 392 (1923).

and such schools shall be free and without charge for tuition to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein.²

It shall be the duty of the school board of any district in which the electors have voted to suspend all of the schools in the district to provide for the payment of the tuition of all children of school age residing in the district who desire to attend school in some adjoining district or districts during such time as the district school is suspended, and to provide transportation to and from school for a period of at least six months during the school year or for such time as the district school is suspended, for all children between the ages of six and sixteen residing more than one mile from the nearest school.³

The electors, in accordance with the above provision, had voted at their annual school meeting not to hold school in their own district but to pay the tuition of the pupils and to provide transportation to other schools. The school board accordingly contracted for the transportation of thirty pupils to the school in the city of De Pere, Wisconsin. Of the twenty-seven children carried, two attended the public school, the others a parochial school. Four of those attending the parochial school took forty minutes of work in the public school. When the bus driver presented his order for salary due him, the school district treasurer refused to honor it, charging that the purpose of the contract was to secure transportation for pupils to the private school, that the district board had no authority to make such a contract, and that therefore the contract was void.

The bus driver knew that the pupils did not attend the public school. In fact, five of them were his own children. The minutes of the district school meeting showed that the county superintendent had explained that if two of the children went to public school, the rest might ride in the bus and the bus driver receive full pay. It was intended to secure transportation of pupils at public expense to a private school

² Constitution of Wisconsin, Article 10, Section 3.

³ Wisconsin Statutes, 1929, Subsection 1/c Section 40.16.

under cover of transporting two pupils to the public schools. The court held that the school board might pay for the tuition of the pupils in some other public school and provide for their transportation, but that a school district could not be burdened with the expense of transporting pupils to other than the public schools.

The court said that the scope and purpose of the free education statutes was to provide free nonsectarian instruction for all persons of school age, that the statute authorizes transportation of none but public school pupils, that the school board had thus gone beyond their authority in endeavoring to provide transportation of pupils to a private school, and that therefore the contract was not valid.

In Minnesota a similar case arose in a certain village where there was, besides the public school, a parochial school. The parochial school was attended by children from both the village and the country who lived in the consolidated school district. A demand had been made on the public school authorities to permit children from the parochial school to take manual training and domestic science in the public schools and to receive transportation in the public school bus. These children lived within the consolidated school district and were attending the parochial school, but were enrolled in the public school for one subject, such as manual training or domestic science.

The attorney-general ruled that the school board might permit children attending a private school in close proximity to the public school to take these courses or any other special course, but it was under no legal obligation to do so; that the classes and the facilities maintained in connection with them are for the benefit of the children "regularly enrolled in the public school but not for those enrolled in the private school"; that under the Minnesota law ⁴ parents may send their children to either a public or a private school, but that if they choose to send their children to a private school, they

⁴ Minnesota Laws, 1919, Chapter 320.

thereby waive the privileges they would have by reason of attendance at the public school; and that permitting children enrolled in the private school to take special courses in the public school would not impose upon the board the duty of providing such children with transportation. The duty imposed upon the school board under the Minnesota law⁵ to provide such facilities is one it owes only to the children regularly enrolled in the public school.

To be regularly enrolled therein, children must be in attendance thereat each day during the hours school is in session for five days a week, and during the number of months school is maintained, unless excused from regular attendance under Chapter 320, Laws 1919. Children enrolled in a private school who there obtain all their schooling, with the exception of special courses taken at the public school, consuming in each case an hour or such a matter a day, cannot be said to be regularly enrolled in the public school.

Not only is there no duty imposed upon the board to provide transportation facilities to the children in question but the board is powerless to furnish the same, even though it might see fit to do so. To expend school funds for such purpose would mean, upon a final analysis, the expenditure thereof in providing transportation facilities to children attending a private school. It would constitute the expenditure of school funds in aid of the support and maintenance of a private school. This the board has no authority to do. Moreover, in the case you cite, it would constitute the expenditure of public funds in aid of the support and maintenance of a private school wherein doctrines and creeds of a particular religious sect are promulgated and taught. This the law does not permit.⁶

The position here taken may be said to be consistent with our general public school policy and the American principles of separation of church and state. It may be difficult for some to see why their children going to a private or parochial school should be denied transportation in the public school

⁵ *Ibid.*, 1915, Chapter 238.

⁶ Ruling of the Minnesota attorney-general on transportation of pupils to private schools, October 22, 1919.

bus which passes their doors, and for whose support they are taxed. This denial is, however, the only course that may be rightfully pursued. The matter of transportation is one of the privileges that accompanies attendance at a public school, and it is only as the children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would directly or indirectly constitute an appropriation of public funds for private or sectarian purposes, and would thus ignore the fundamental purpose of our educational system as set forth in our constitutional and statutory laws.

II. COMPELLING ATTENDANCE AT PUBLIC OR APPROVED PRIVATE SCHOOLS

Since the decisions were handed down by the United States Supreme Court in *Meyer v. Nebraska*⁷ and *Pierce v. Society of Sisters*,⁸ the Supreme Court of New Hampshire, in May of 1929, heard the case of *State v. Hoyt*,⁹ in which an interpretation was sought of the New Hampshire compulsory school attendance statute requiring children of school age to be sent to a public school or to an approved private school.¹⁰ Hoyt and others were charged by the state with failure to send their children to a public school. Hoyt raised the defense that his child was instructed by a private tutor in his own home in the studies required in the public schools for one of his age, and that the statute violated the federal guarantee of liberty contained in the fourteenth amendment to the constitution.

The court quoted from the case of *Fogg v. Board of Education*:¹¹

"Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public

⁷ 262 U. S. 390, 43 Sup. Ct. Rep. 625, 67 L. ed. 1042 (1923).

⁸ 268 U. S. 510, 45 Sup. Ct. Rep. 571, 67 L. ed. 1070 (1925).

⁹ 84 N. H. 38, 146 Atl. 170.

¹⁰ New Hampshire Laws, 1926, Chapter 118, Sections 1, 2.

¹¹ 76 N. H. 296, 299 L.

good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so."

He then went on to say:

Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. . . . The object of our school laws is not only to protect the state from the consequences of ignorance, but also to guard against the dangers of "incompetent citizenship."

The Supreme Court of New Hampshire pointed out that it did not think that the federal decisions went so far as to say that the sole obligation that can be imposed upon the parent by the compulsory school attendance statute is to educate his child, but that it provides also that the parent's method must be approved by the state. It held that under the federal guarantee, so far as it had been interpreted, attendance at some school may be required and that the state may supervise the school attendance. ~

"The power to supervise," said the court, "necessarily involves the power to reject the unfit, and to make it obligatory to submit to supervision." The local statute does not go beyond these requirements. According to the court the federal decisions did not deny that the state has power to insist upon approving the proposed substitute for public school attendance, that such power is not limited to a mere inspection of what is being done and prosecuting for deficiencies.

The matters so enumerated include all that are involved in this litigation. The power "reasonably to regulate," to require attendance, good character of teachers, studies to be taught and those to be prohibited, all look to laying down rules for future conduct. As the statute does not exceed the exercise of these powers, it is held to be constitutional.

In the adjustment of the parent's right to choose the manner of his children's education, and the impinging right of the state to insist that certain education be furnished and supervised, the rule of reasonable conduct upon the part of each towards the other is

to be applied. The state must bear the burden of reasonable supervision, and the parent must offer educational facilities which do not require unreasonable supervision.

If the parent undertakes to make use of units of education so small, or facilities of such doubtful quality, that supervision thereof would impose an unreasonable burden upon the state, he offends against the reasonable provisions for schools which can be supervised without unreasonable expense. The state may require not only that educational facilities be supplied but also that they be so supplied that the facts in relation thereto can be ascertained, and proper direction thereof maintained, without unreasonable cost to the state. Anything less than this would take from the state all efficient authority to regulate the education of the prospective voting population.

If any substantial supervisory power remains to the states, it is not perceived how it could well be reduced below the minimum required here. This bears no resemblance to the "affirmative direction concerning the intimate and essential details of such schools," which was held to be invalid in *Farrington v. Tokushige*, 273 U.S. 284.

The interpretation placed upon the federal cases by the New Hampshire court would seem to do no violence to the opinions rendered by the United States Supreme Court, nor would it be an improper invasion of the rights of parental control. It would seem to be reasonable not only to leave to the legislature of the state the power to delegate proper officials to approve such private or church schools, such inspection and requirements to be within reasonable bounds, but also to give to parents the privilege of choosing which school they wish their children to attend.

III. FURNISHING FREE TEXTBOOKS TO PRIVATE SCHOOLS

In connection with the furnishing of free textbooks to school children, an interesting case arose in Louisiana, which recently passed a law providing pupils of both public and private schools with free textbooks.

Cochran, a citizen and taxpayer of Louisiana, brought

suit¹² to prevent the State Board of Education and other state officers from appropriating money from the Severance Tax Fund for purchasing schoolbooks to be supplied free of cost to school children of the state under Acts No. 100 and No. 143 of 1928, upon the ground that these acts constituted a violation of the constitution of the state, which declares, "No money shall ever be taken from the public treasury . . . in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister, or teacher thereof"¹³ and that it constituted a violation also of Article 4, Section 4,¹⁴ and the fourteenth amendment¹⁵ of the federal constitution.

The act provides that the Severance Tax Fund of the state shall be devoted after allowing funds and appropriations as provided by the constitution of the state, first, to supplying schoolbooks to the school children of the state of Louisiana, and that thereafter such further sums as remain in the said Severance Tax Fund shall be transferred to the state public school funds.¹⁶

That the State Board of Education of Louisiana shall provide the said schoolbooks for school children free of cost to such children out of said tax fund, and thereafter apply the remaining sums out of the said Severance Tax Fund to the state public school funds.¹⁷

Act No. 143 made the appropriation for the above purpose.¹⁸

¹² 168 La. 1030 (1929).

¹³ Constitution of Louisiana, Article 53.

¹⁴ "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

¹⁵ "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law."

¹⁶ Louisiana Laws, 1928, Act No. 100, Section 1.

¹⁷ *Ibid.*, Section 2. Section 3 of the act exempts from its provisions persons attending colleges or universities.

¹⁸ "Appropriations out of that fund, \$750,000 for each of those years, the appropriations to be used for the following purposes, to wit:

"For purchase of free schoolbooks for the use of school children of this state, to be expended by the State Board of Education of Louisiana as provided by

From this it will be seen that money may be taken from the above-mentioned fund to supply schoolbooks to the school children of the state and that the Board of Education is directed to provide such schoolbooks free of cost to the children.

The Supreme Court of Louisiana held that furnishing free textbooks to school children of the state was not a violation of either the state or the federal constitution. It held further that it presented no federal question under Article 4, Section 4, of the federal constitution, which guarantees to every state a republican form of government and under which political rather than judicial questions arise. It was charged that the purpose of the act was to aid private, religious, sectarian, and other schools not within the public school system of the state by furnishing free textbooks to the children attending them. The Supreme Court of Louisiana pointed out that such money was not appropriated for the use of any school, private, or sectarian, or even public, in the following words:

One may scan the acts in vain to ascertain where any money is appropriated for the purchase of schoolbooks for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing schoolbooks for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for

House Bill No. 90 of 1928, Act No. 100 of 1928, or so much thereof as may be necessary." Louisiana Laws, 1928, Act No. 143.

the use of such children. . . . What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the State Board of Education is doing. Among these books, naturally, none is to be expected adapted to religious instruction.

The Supreme Court of Louisiana affirmed the judgment of the trial court, and Cochran appealed to the Supreme Court of the United States.¹⁹ Chief Justice Hughes, who delivered the opinion of the court, affirmed the decision of the state court, holding that money derived from taxation might be appropriated by the state for the purpose of supplying schoolbooks free of charge to children in private as well as in public schools without violating the fourteenth amendment, which prohibits the taking of private property for private use, where the books furnished for private schools are granted not to the schools themselves but only to or for the use of the children, and are the same as those furnished for public schools, not being religious or sectarian in character. He said:

Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.

The decision in the case of *Cochran v. Louisiana State Board of Education* concedes greater rights to the state than that in *Meyer v. Nebraska*²⁰ and in *Pierce v. Society of Sisters*.²¹ Those cases conceded to the state the right to require of its future citizens and voters that they be educated, but declared it to be the right of the parent to decide whether

¹⁹ 281 U. S. 370 (1930).

²⁰ 262 U. S. 390 (1923).

²¹ 268 U. S. 510 (1925).

that education should be in the public or in the private schools, or even in the home through private tutors. As we have seen, they conceded that the state might regulate and superintend such education to the extent of requiring the children to be trained in good morals and good citizenship. In short, they repudiated the Spartan theory of education.

The Louisiana case authorizes general taxation for the purpose of purchasing textbooks for use in both the public and in the private and church schools, though the state constitution prohibits the appropriation of public funds for sectarian purposes. This decision, as has been pointed out, was based on the consideration that the money is not appropriated to the schools but is expended for textbooks which are given to the children, this gift being made to all the children of the state. To use the words of the court, it is "only the use of the books that is granted to the children, or, in other words, the books are lent to them." The school children and the state alone are, consequently, the beneficiaries. No discrimination is made. All the children of the state receive the same benefits and privileges.

In 1922, in the case of *Smith v. Donahue*,²² the New York court held that public funds could not be used to furnish textbooks and other school supplies to parochial or other private schools. There the Board of Education was furnishing textbooks and school supplies to certain parochial schools maintained and controlled by the Roman Catholic church. These schools were, of course, independent of the public school system. The court declared that it was the principle of the law, both constitutional and statutory, not to join religious instruction with secular education in the private schools, and that accordingly the state or a subdivision thereof could not assist the parochial schools maintained for the purpose of furthering a given religious tenet. A similar position was taken by Maine in the early case *Donahoe v. Rich-*

²² 202 App. Div. 656, 195 N. Y. S. 715 (1922).

ards.²³ This has been the position taken by state legislatures, courts, and school boards in general. If Louisiana has not actually abandoned this principle, she has at least found a way in which to approximate doing what is forbidden elsewhere.

There is no question but that the Louisiana case goes further than any case of its kind. The question naturally arises as to just how far the state can go.²⁴

The plan of state aid to all students without regard to whether they attend private or public schools has been in general practice for some time in matters of health. The law has now extended it to textbooks. It cannot be denied that such extensions should be carefully watched, for if it is conceded that textbooks essential to education may be furnished to the children of the state through state appropriations, might it not be granted that athletic supplies or musical instruments are essential to an education and that therefore they might properly be paid for by the state? And that, since teachers are necessary in furnishing children an education, by the same logic all teachers should be paid by the state? These are, of course, extreme examples, and it does not appear from the opinions rendered, as the *Illinois Law Review* points out, that there is any immediate danger.²⁵

²³ 38 Me. 376 (1854).

²⁴ *Law Notes*, March, 1931, p. 233.

²⁵ *Illinois Law Review*, 25:547-49 (January, 1931).

CHAPTER XIV

RELIGION IN INDIAN SCHOOLS

THERE are among the various Indian tribes throughout the United States today two kinds of school, the private sectarian or parochial school and the government Indian school. There has been some overlapping of the two, and our federal government has not always maintained a clear division between church and state. The administration of the Indian schools has been carried on by our federal government rather than by the states, its direction falling within the Department of the Interior. The federal government is bound in its regulation of the Indian schools by the first article of the constitution, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof" and under the last clause of Article 6: "but no religious test shall ever be required as a qualification to any office or public trust under the United States."

Prior to 1869 conditions among the Indians on the western frontier were chaotic. Guerrilla warfare and general disturbance were prevalent. The administration of Indian affairs on the various reservations had been so scandalous that it had attracted widespread public attention. Education and school facilities for the Indian were meager, and those that did exist were largely in the hands of the various church missions.

I. APPROPRIATIONS TO INDIAN SCHOOLS

With the inauguration of President Grant a new epoch began. The policy that came to be known as the "peace policy" was inaugurated. This policy had for its objective, as stated by the secretary of the interior in 1873, "the restraint

and elevation of the wild tribes of the frontier through firm but kind treatment."

An effort was made to secure honest Indian agents. The policy was adopted of asking each religious denomination to assume the responsibility of recommending to the president deserving men for the reservations on which they carried on missionary enterprises.

This effort on the part of President Grant and his officers to improve the status of the Indian brought out the necessity of establishing schools for the Indian children. In 1869 Grant invited the churches of the country to establish mission schools among the Indians. This invitation was accepted by practically all the leading denominations, and a number of schools, supported from church funds the same as other missions, were soon in successful operation. That same year plans were set on foot to establish government schools for the Indians. In 1868 a treaty had been concluded between the United States and the different tribes of Sioux Indians, Article 7 of which provided:

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.¹

President Grant did not fail to distinguish clearly between two kinds of schools and to prevent sectarian influences in

¹ 15 Statutes at Large, 635. This treaty was proclaimed on February 24, 1869.

the government schools, as is apparent from a statement made in connection with his recommendation for such legislation, "No sectarian tenets shall ever be taught in any schools supported in whole or in part by the state, nation, or by the proceeds of any tax levied upon any community."²

The practice of securing nominees from the various religious organizations did not prove satisfactory, and it was replaced by the policy of educating Indian children by government aid. By 1885 the annual appropriations made by Congress for education among Indian tribes exceeded a million dollars. Congress was establishing and providing for a system of large non-reservation boarding schools. It created the position of superintendent of Indian schools, upon whom it placed the responsibility of reporting a plan for the education of all Indian youth.

It was not long, however, until the churches, in response to the invitation to establish church schools, began to request the government to assist in financing these schools, with the result that by 1896 the various sums paid out annually by the government for the support of sectarian Indian education totaled more than a half million dollars.

At about this time, as the facts were brought out, so positive a sentiment arose in opposition to the practice of making grants for sectarian education that Congress decided to discontinue the appropriations, declaring it "to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school."³ This decision was acquiesced in by the different denominations, but the practice was not completely abolished. It should be noted, however, that the provision in the act quoted above prohibits the federal government only from using *public* appropriations for payment of tuition for Indian children attending denominational schools. Appropriations continued to be made

² Seventh Annual Message to Congress, *Congressional Record*, 4:181 (December 7, 1875).

³ Act of June 7, 1897, 30 Statutes at Large, 79.

from treaty and trust funds to certain sectarian schools. It was contended by some that these appropriations were made in violation of the act of June 7, 1897, inasmuch as they were made to certain denominational schools.

Considerable misunderstanding arose over this question, which finally resulted, in 1908, in the question being carried to the Supreme Court of the United States.⁴ The action was brought by Reuben Quick Bear and other Indians of the Sioux tribe of the Rosebud Agency, South Dakota, but indirectly the plaintiff was the Indian Rights Association; the action was brought against Leupp, the commissioner of Indian affairs, and other government officials, but the real defendant was the Bureau of Catholic Indian Missions of Washington, D. C.

The plaintiffs sought a permanent injunction against Francis E. Leupp to restrain him from executing any contract with the Bureau of Indian Missions or any other sectarian organization for the support, education, or maintenance of any Indian pupils in the St. Francis Mission Boarding School or any other sectarian school on the Rosebud Reservation or elsewhere, on the grounds that it was in violation of Article 7 of the Sioux Treaty of April 29, 1868.⁵

The court held that a statutory limitation on expenditures of the public funds does not, in the absence of a special provision to that effect, relate to the expenditure of treaty and trust funds administered by the government for the Indians. The general appropriation acts forbid contracts for the education of Indians in sectarian schools, but this prohibition relates only to appropriations of public money raised by general taxation from persons of all creeds and faiths and not to tribal and trust funds belonging to the Indians, in this case the Sioux Indians; and the officers of the government cannot be prevented from carrying out contracts made with sectar-

⁴ *Reuben Quick Bear v. Leupp, Commissioner of Indian Affairs*, 210 U. S. 50 (1908).

⁵ 15 Statutes at Large, 635. (Quoted above.)

ian schools and entered into at the request of such Indians to the prorata extent that the petitioning Indians are interested in the fund. Thus it will be seen that the prohibition is upon using public appropriations for payment of tuition for Indian children attending denominational schools but does not apply to moneys belonging to an Indian tribe or to moneys which the United States would pay to an Indian office in settlement of an obligation arising under a treaty or agreement with a tribe.

Said the court:

The difference between one class of appropriations and the other has long been recognized in the annual appropriation acts. The gratuitous appropriation of public moneys for the purpose of Indian education has always been made under the heading "Support of Schools," whilst the appropriation of the "Treaty Fund" has always been under the heading "Fulfilling Treaty Stipulations and Support of Indian Tribes," and that from the "Trust Fund" is not in the Indian Appropriation Acts at all. One class of appropriations relates to public moneys belonging to the government; the other to moneys which belong to the Indians and which is administered for them by the government.

From the history of appropriations of public moneys for education of Indians, set forth in the brief of counsel for appellees and again at length in the answer, it appears that before 1895 the government for a number of years had made contracts for sectarian schools for the education of the Indians, and the money due on these contracts was paid, in the discretion of the commissioner of Indian affairs, from the "Tribal Funds" and from the gratuitous public appropriations. But in 1894 opposition developed against appropriating public moneys for sectarian education. Accordingly, in the Indian Appropriation Act of 1894, under the heading of "Support of Schools," the secretary of the interior was directed to investigate the propriety of discontinuing contract schools and to make such recommendations as he might deem proper. The secretary suggested a gradual reduction in the public appropriations on account of the money which had been invested in these schools, with the approbation of the government. He said: "It would be scarcely just to abolish them en-

tirely—to abandon instantly a policy so long recognized,” and suggested that they should be decreased at the rate of not less than twenty per cent a year. Thus in a few years they would cease to exist, and during this time the bureau would be gradually prepared to do without them, while they might gather strength to continue without government aid.

Accordingly Congress introduced in the appropriation act of 1895 a limitation on the use of public moneys in sectarian schools. This act appropriated, under the heading “Support of Schools,” “for the support of Indian and industrial schools and for other purposes . . . \$1,164,350, . . . provided, that the secretary of the interior shall make contracts, but only with the present contract schools for the education of Indian pupils during the fiscal year ending June 30, 1896, to an extent not exceeding eighty per cent of the amount so used in the fiscal year 1895, and the government shall as early as practicable make provision for the education of the Indians in government schools.”

This limitation of eighty per cent was to be expended for contract schools, which were those that up to that time had educated Indians through the use of public moneys, and had no relation and did not refer to “Tribal Funds.”

In the appropriation act of 1896, under the same heading, “Support of Schools,” the appropriation of public money of \$1,235,000 was limited by a proviso that contracts should only be made at places where nonsectarian schools cannot be provided for Indian children to an amount not exceeding fifty per cent of the amount so used for the fiscal year 1895, and immediately following the appropriation of public money appears the expression, “and it is hereby declared to be the settled policy of the government to hereafter make no appropriation whatever for education in any sectarian school.” This limitation, if it can be given effect as such, manifestly applies to the use of public moneys gratuitously appropriated for such purpose, and not to moneys belonging to the Indians themselves. In the appropriation act of 1897 the same declaration of policy occurs as a limitation on the appropriation of public moneys for the support of schools, and the amount applicable to contract schools was limited to forty per cent of the amount used in 1895. In the act of 1898 the amount applicable to contract schools was limited to thirty per cent, and in the act of

1899 the amount so applicable was limited to fifteen per cent, these words being added: "this being the final appropriation for sectarian schools." The declaration of the settled policy of the government is found only in the acts of 1896 and 1897, and was entirely carried out by the reductions provided for.

Since 1899 public moneys are appropriated under the heading "Support of Schools" "for the support of Indian and industrial schools and for other educational purposes," without saying anything about sectarian schools. This was not needed, as the effect of the legislation was to make subsequent appropriations for education mean that sectarian schools were excluded in sharing in them, unless otherwise provided.⁶

It will be seen that because of the situation in which the government found itself, if such might be considered a sufficient reason, appropriations were made by the government from its general funds to sectarian schools. These were gradually diminished until the year 1899, when the last appropriation from public funds was made to these denominational schools. Since 1899 appropriations from trust or treaty funds have continued, for, said the court:

"The 'Treaty' and 'Trust' moneys are the only moneys that the Indians can lay claim to as a matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit and in part for their education; it seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction for which the complainants contend."⁷

An agreement with the Sioux Indians, approved on March 2, 1899,⁸ provided for payment to the Sioux tribes of certain

⁶ Reuben Quick Bear v. Leupp, *supra*.

⁷ *Ibid*.

⁸ 25 Statutes at Large, 894. "Section 17. That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modi-

moneys for a period of twenty years. These moneys were duly appropriated by Congress and later, upon request of the Indians, payment therefrom was made to certain mission schools. In the appropriation items in the acts of Congress, reference was made each year to this agreement. After 1910 Congress for several years added the words: "which agreement is hereby extended to and including June thirtieth, nineteen hundred and fourteen."⁹

In the appropriation act for the Bureau of Indian Affairs, approved on May 18, 1916, the language was changed to read: for support and maintenance of day and industrial schools among the Sioux Indians, including the erection and repairs of school buildings, \$200,000 in accordance with the provision of Article V of the agreement made and entered into September sixth, eighteen hundred and seventy-six, and ratified February twenty-eighth, eighteen hundred seventy-seven.¹⁰

This treaty appropriation was based upon the prior agreement of 1877, which contained no twenty-year limitation. Since 1916 the same wording has been used each year.¹¹ Some of this money is still being used for payment of tuition in

fications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect . . ."

⁹ Letter to the author from the Department of the Interior, Office of Indian Affairs, January 7, 1933.

¹⁰ This was an act to ratify an agreement with certain bands of the Sioux Nation of Indians and also with the Arapaho and Cheyenne Indians. It read in part: "Article 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868.

"Article 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life." 19 Statutes at Large, 256.

¹¹ For treaties and reports dealing with Indians see *Indian Affairs, Laws and Treaties*, compiled by Charles J. Kappler (4 vols., Government Printing Office, 1902-29).

denominational schools among the Sioux and other Indian tribes.¹²

II. RELIGIOUS GARB

Another question relating to Indian schools that has provoked considerable discussion is the wearing of sectarian garb by certain teachers in government schools. The question involved was, Should employees in government Indian schools be permitted to wear, while on duty as public officers, religious garb, and to display in the schoolrooms the insignia distinctive of any religious order or society? The persons affected were government employees engaged by the Indian Office as teachers in these schools. They were public officers who had taken the usual oath of office. They had been accustomed to wear while on duty the distinctive garb and in-

¹² According to the Office of Indian Affairs the following are the mission or private schools to which the government paid tuition during the fiscal year of 1933 for attendance of Indian children, from treaty or tribal funds, and the total amounts so authorized. One state school is included (Murray). The list was prepared by Commissioner C. J. Rhoads, Office of Indian Affairs, Department of the Interior, January 19, 1933.

SCHOOLS	INDIANS	FUNDS	AMOUNTS AUTHORIZED
Chippewa			
St. Mary's	Red Lake	Tribal	\$15,000
St. Benedict's	Consolidated Chippewa	Tribal	14,375
Menominee			
St. Joseph's	Keshena	Tribal	27,500
Arapaho			
St. Stephen's	Shoshone	Treaty	12,500
St. Michael's	Shoshone	Tribal	10,375
St. Stephen's	Shoshone	Tribal	3,750
Shoshone Mission	Shoshone	Tribal	2,500
Cheyenne			
St. Labre's	Tongue River	Treaty	8,750
Choctaw			
St. Agnes Mission	Choctaw	Tribal	8,750
Old Goodland	Choctaw	Tribal	16,750
Oklahoma Presbyterian	Choctaw	Tribal	12,500
Murray State School of Agriculture	Choctaw	Tribal	2,000

signia of religious societies or orders to which they belonged. They had also caused or permitted to be displayed on the walls and elsewhere in government buildings other insignia, pictures, badges, and mottoes peculiar to these societies.

The schools are a concrete expression of the policy adopted by the government in discharging its trust toward its wards, the Indians. They are owned by the United States and under the laws are subject solely to the management and control of the United States and its agencies. In short, they are public schools.

It was in connection with these schools that the Honorable Robert G. Valentine, commissioner of Indian affairs, issued Circular No. 601, which reads as follows:

In accordance with that essential principle in our national life—the separation of church and state—as applied by me to the Indian Service, which as to ceremonies and exercises is now being enforced under the existing religious regulations, I find it

Note 12 *continued*

SCHOOLS	INDIANS	FUNDS	AMOUNTS AUTHORIZED
Sioux			
Immaculate Conception	Crow Creek	Treaty	5,250
Immaculate Conception	Lower Brule	Treaty	2,000
Hare Industrial	Crow Creek	Treaty	250
St. Mary's	Crow Creek	Treaty	223
St. Mary's	Lower Brule	Treaty	375
Holy Rosary	Pine Ridge	Treaty	32,175
Holy Rosary	Pine Ridge	Treaty	5,450
Holy Rosary	Pine Ridge	Tribal	3,000
St. Francis	Pine Ridge	Treaty	3,750
Hare Industrial	Pine Ridge	Treaty	500
St. Mary's	Pine Ridge	Treaty	375
Santee Normal	Pine Ridge	Treaty	1,250
St. Francis	Rosebud	Treaty	32,500
St. Francis	Rosebud	Treaty	6,000
St. Francis	Rosebud	Tribal	5,250
Hare Industrial	Rosebud	Treaty	1,250
Santee Normal	Rosebud	Treaty	1,875
Hare Industrial	Cheyenne River	Tribal	1,250
St. Mary's	Cheyenne River	Tribal	1,250
Santee Normal	Cheyenne River	Tribal	3,750
Santee Normal	Standing Rock	Treaty	875
Santee Normal	Yankton (Santee)	Tribal	1,125
St. Louis Mission	Osage	Tribal	2,470

necessary to issue this order supplementary to those regulations, to cover the use, at those exercises and at other times, of insignia and garb as used by various denominations. At exercises of any particular denomination there is, of course, no restriction in this respect, but at the general assembly exercises and in the public schoolrooms, or on the grounds when on duty, insignia or garb has no justification.

In government schools all insignia of any denomination must be removed from all public rooms, and members of any denomination wearing distinctive garb should leave such garb off while engaged at lay duties as government employees. If any case exists where such an employee cannot conscientiously do this, he will be given a reasonable time, not to extend, however, beyond the opening of the next school year after the date of this order, to make arrangements for employment elsewhere than in federal Indian schools.

This led to a hearing before Secretary Fisher of the Department of the Interior on April 8, 1912.¹⁸ Mr. Valentine appeared before Secretary Fisher in defense of the Indian Office Circular No. 601. The order was issued, he declared, simply because it had become clear that to permit a continuance of the practice against which it was directed would be irreconcilable with the American axiom, the complete separation of church and state. Mr. Valentine then cited certain statements to show that the separation of church and state is an essential principle of our American policy, which needs neither defense nor proof of its existence, being an accepted fact. He pointed out that to continue the practice in question would be inconsistent with the duty that an executive officer must regard as his—namely, the maintenance of the complete separation of church and state, the duty of preserving the public schools free from sectarian influence.

The wearing of these ecclesiastical robes and insignia in the schoolroom exerts, he said, a sectarian influence. The garb proclaims to the world that the wearer is set apart

¹⁸ *Religious Garb in Indian Schools* (Government Printing Office, Washington, D. C., 1912).

from it by vows of extraordinary devotion to a particular order in a particular church; that the life, services, and fortune of the individual are dedicated to a particular cause; that it was this signification to which the objection is raised and not to the wearer. Though the one wearing the garb may be careful in making no mention of it and may endeavor to go about in an inconspicuous way, nevertheless the very presence of such a dress in a schoolroom gives to that school a denominational character. The teachers appear as ecclesiastical persons rather than in the capacity of public officers and teachers.

The wearing of the garb itself in the school does promote the cause of whatever church it represents. This is the effect on the Indian. And to the casual visitor the school must appear as one conducted by a religious order; he would have no reason to think he was in an institution conducted by the United States. Since I am unable to see how this government can countenance such a use of its agencies, the order forbidding the garb and insignia in the schools was to my mind a necessary supplement to existing regulations.

The position taken by Mr. Valentine in the hearing before Secretary Fisher of the Department of the Interior on the question of the religious garb in Indian schools conducted by the government is similar to the position now taken by various states, as declared by court decisions,¹⁴ with respect to the wearing of religious garbs in their public school systems.

Mr. Valentine pointed out that as early as 1885 it had been declared in the report of the commissioner of Indian affairs:

It will be the policy of the Bureau, while under its present control, to manage by and through its own appointees all schools which occupy buildings erected with funds furnished by the government. The government should manage its own schools, and the different denominations should manage theirs separately.

¹⁴ *O'Connor v. Hendrick*, 184 N. Y. 321, 428 (1906); *Commonwealth v. Herr*, 229 Pa. 132 (1910); by statutory law, as in Pennsylvania, Act of June 27, 1895.

In a word, in the management of schools, the government should be divorced from sectarian influence or control. Any other course would end in heart-burning, confusion, and failure. But the government can, and does, fairly and without invidious discrimination, encourage any religious sects whose philanthropy and liberality prompts them to assist in the great work of redeeming these benighted children of nature from the darkness of their superstition and ignorance.¹⁵

Thus it was maintained that, while the general policy of the government might at times have been obscured by the administrative contingencies of the moment, it had always been clear that the public policy, as it had been reiterated year after year by the secretary of the interior and the commissioner of Indian affairs, is to have a system of government schools for Indian children in which sectarianism has no place.

What actually had taken place was that the government had taken over certain Catholic Indian schools. The teachers who had been employed in the schools prior to their transfer were brought over along with the schools. These teachers, it appears, were transferred without even the formality of civil service examinations and were permitted, as government employees, to continue wearing their religious dress and displaying religious insignia in the schoolrooms. The schools were supported by the government instead of by the Roman Catholic church as theretofore.¹⁶

The order of Mr. Valentine previously referred to created a stir among the Catholics, whereupon President Taft revoked the order until such time as a hearing could be given to all parties concerned. Approximately eight months intervened between the time the hearing was held, April 8, 1912, and the time President Taft made public his decision. In the meantime the order remained suspended, and there was considerable agitation over the question. Newspapers carried

¹⁵ Annual Report of the Commissioner of Indian Affairs, 1885, p. 14.

¹⁶ *Religious Garb in Indian Schools*, pp. 5-7, 18-24.

articles discussing the hearing and the principles involved.¹⁷ Protestants lined up in opposition to the Catholics.

President Taft permanently revoked the order which he had temporarily suspended. His decision was based upon the findings of the secretary of the interior, in which the legal and constitutional phases of the question were discussed and in which the secretary arrived at the conclusion that the question involved is one of administrative policy which does not involve the constitutional provision for the separation of church and state. He therefore thought it unnecessary to adopt any rule requiring the teachers then employed by the government to lay aside their religious garbs. He did, however, recognize the desirability of eliminating this religious feature from the government schools by not employing any additional members of religious orders as teachers. The secretary said in part:

There is no federal statute prohibiting the use of a distinctive garb by teachers in the Indian schools. It is, therefore, not unlawful to permit the use of such a garb, nor would it be unlawful to prohibit the further use thereof if, in the judgment of the secretary of the interior, who is given authority over these schools, it is wise to adopt such a regulation.

The objection urged against the garb is that in and of itself it constitutes sectarian teaching. I do not think that this is true in any accurate use of the word teaching. What is really meant is that the wearing of the garb exerts an influence upon the pupils which is favorable to the particular religious creed or system of its wearers, and I believe that the natural tendency to take advantage of the influence thus acquired in a distinctly sectarian fashion and for distinctly sectarian ends is a sufficient reason for providing against the extension of the practice and for its gradual but certain elimination. It is to the interest of the Indians that, as promptly as it can be wisely done, the issue which must constantly arise from this practice shall be removed from the field

¹⁷Some of these articles appeared in the *Outlook* for March 30, 1912, pp. 718, 719, under the title "Indian Government Schools." See also *The United Presbyterian*, February 29, 1912, and in *The New York Weekly Witness*, February 21, 1912.

of religious or sectarian controversy, and that sectarian and religious controversy shall be removed from the Indian Service.¹⁸

After his review of the letter President Taft made the following statement:

This solution, it seems to me, is very equitable as to existing conditions, is quite in accordance with the purpose of Congress, and ought to satisfy all persons in interest of the purpose of the Interior Department to do equity, and at the same time to carry out the congressional intent.

The action of the secretary of the interior is, therefore, approved.

It appears that the president's exception was hardly realized, for "all persons in interest" were by no means satisfied with the decision. What seemed to be the effect of the decision was well stated in an editorial in the *Outlook*,¹⁹ which said in part:

The decision of President Taft with regard to the wearing of religious insignia or ecclesiastical dress in government Indian schools can hardly be wholly satisfactory to anybody. Devout Catholics who believe it is a function of government to teach religion will not be satisfied, because the president decides that no teachers will hereafter be engaged in such schools who wear ecclesiastical garb; devout Protestants will not be satisfied, because fifty-one teachers formerly connected with Catholic schools now wearing ecclesiastical dress in the government schools are permitted to continue the practice; the great body of American citizens, without regard to religious creed, who believe in the complete separation of church and state, will not be satisfied with the president's explanation of what is sectarian and what is not sectarian in government administration. . . . The argument of Secretary Fisher and of the president may be substantially condensed as follows: There is nothing in the federal constitution or federal statutes to compel the president to exclude sectarian garb from the Indian schools, therefore in permitting it he is violating no

¹⁸ Report of the secretary of the interior on Sectarian Garb in Government Schools to President Taft. See also "Religious Work among the Indians" in the *Report of the Department of the Interior*, 1912, 2:59.

¹⁹ October 5, 1912, p. 234.

law; there are only fifty-one teachers wearing such garb in the Indian schools; the government ought not to permit this number to grow, and in so far as we can we will take action to prevent its growing; it is true that the Indian schools are public schools and ought not to be sectarianized; the situation is a difficult and delicate one, but we think the simplest thing to do is to let the teachers now wearing ecclesiastical garb remain, as, after all, there are only fifty-one, and let the practice, even if it is not altogether in harmony with American institutions, die of its own accord. We think Commissioner Valentine was right and that the president was wrong. It would be much better to turn all Indian schools over to private management, letting the Catholic Indians go to Catholic schools and the Protestant Indians to Protestant schools, than to involve the public school system of the United States in any kind of controversy over what we hope is the irrevocably established policy of a complete separation of church and state in this country.²⁰

There were on January 19, 1933, five of these employees wearing religious garb and teaching in the government Indian schools "who were in the service prior to the time of the Garb Order [August 24, 1912], all others having been gradually eliminated from our service."²¹

III. PRESENT PRACTICES IN GOVERNMENT SCHOOLS

According to the *Regulations for Government Indian Schools* issued by the Indian Office of the Department of the Interior,²² pupils in government Indian schools are "expected to attend the respective churches to which they belong or for which their parents or guardians express a preference."²³ A pupil attends a church of the denomination on whose mem-

²⁰ Sectarian or denominational papers differed on the question. Protestant papers approved the decision, whereas Roman Catholic papers revealed an attitude of disappointment and dissatisfaction. Such articles appeared in *America*, October 5, 1912, and *The Catholic Standard* and the *Times* of October 14, 1921.

²¹ Letter to the author from the commissioner of Indian Affairs, January 19, 1933.

²² *Regulations of the Indian Office for Indian Schools* approved by the secretary of the interior, January 30, 1928.

²³ *Ibid.*, Rule 129.

bership record his name appears. If, when a child is under eighteen years of age, parents or guardians make a written request that the child be instructed in some other religion, he must have the privilege of attending such services. Pupils over eighteen may choose the church they wish to attend.²⁴

Superintendents are requested to "furnish to local representatives of each religious denomination a list showing those children under eighteen years of age who are duly accredited to each of the several denominations represented within, or adjacent to, the reservation."²⁵ If the services of that church are held at a distance from the school, the school is required to arrange for conveyance for those who are too young or are unable to walk to such services. The hours are arranged by the attending pastor and superintendent.

Where the parents of children enrolled in a school off the reservation have not expressed any preference as to the religious instruction, the pupils in a family, tribe, section, or reservation known to be wholly or predominantly Catholic or Protestant are placed under Catholic or Protestant instruction, respectively.

Proselyting among pupils by pastors, employees, or pupils is prohibited. One hour on week days is allowed each church for religious instruction, the hour to be arranged for by superintendents and pastors, though the attendance is not to be compulsory. On Sundays all pupils belonging to any or no denomination are to attend Sunday school either at the school or in a near-by church, which may be selected by the mutual consent of the attending pastor and superintendents. Pupils have permission to attend confession, preparatory courses, and communion services. Any misconduct on the part of pupils while attending church or Sunday school, either at the school or away from the school, must be reported to the superintendent. All religious exercises are to be left to the several denominations. Superintendents and school officials are

²⁴ *Ibid.*, Rule 130, a, b, c, d, e.

²⁵ *Ibid.*, Rule 130, f.

required not only to cooperate loyally with this office [the Indian Office] in holding the balances equally between all churches, granting them equal privileges and excluding special privilege, but must not under any circumstances allow their personal prejudices or church affiliations to bias them in any way.²⁶

In general it may be said that the question of Bible reading is optional with the teacher. Legally it has no sanction, though it is not prohibited. Some of the teachers in Indian schools follow the practice of reading the Bible and offering prayer, others do not. There have been no court decisions or special rulings relating to this practice. Officially the government takes no part in religious instruction in the Indian schools.

In this connection it may be interesting to notice the religious program carried out in one of these schools, that at Genoa, Nebraska, as a typical example of the part that religion plays in the government Indian schools. The school is a government boarding school for Indian boys and girls. Students from the fourth to the twelfth grades are enrolled, the total enrollment being a little over five hundred. Sixty-five persons are employed by the government to carry on the work of the school.²⁷ Credit earned at the school is accepted by the colleges and institutions of higher learning in Nebraska. The course of study offered by this Indian school is approved by the Nebraska State Department of Education.²⁸

Considerable attention is given to the religious side of life. Catholic and Episcopalian students regularly attend Sunday services in their own churches in the city. In addition to the

²⁶ *Ibid.*, Rules 135-44.

²⁷ These figures are for the school year of 1932-33, according to the *Handbook for Students*, and from facts gathered on the school grounds by the author.

²⁸ The school at Genoa was established as a result of a decision made in the summer of 1882 to establish an industrial Indian school somewhere in Nebraska or South Dakota. The Office of Indian Affairs sent Colonel Hayworth to make investigations and report upon the advisability of locating the school at Genoa, Nebraska. Yankton, South Dakota, was also considered as a location, but Genoa was selected. In the winter of 1882 Congress made the necessary appropriation, and in the fall of 1883, the ground having been purchased and a building already

meetings of these denominations a Sunday school, numbering approximately 250, is conducted every Sunday morning at the school building for all Protestant pupils.²⁹ Religious services are held every Sunday evening in the school auditorium. At the chapel services held on school days, generally once a week, a portion of the Bible is read without comment, and prayer is offered. In addition to the church organizations mentioned, the Y. M. C. A. and Y. W. C. A. also carry on active work among the pupils of the school, all of which is supposed to be nondenominational.

It will be seen that considerable opportunity is given for religious activity in these schools. The question may be raised if there is not undue participation in religious matters in view of the fact that such schools are carried on by the government and that public funds should not be expended for religious or sectarian purposes. The situation can be partially accounted for by the fact that before 1869 educational work among the Indians was carried on entirely by churches and conducted as mission work. In taking over these mission schools and developing new ones, it was quite natural that the government should have retained many of the practices of the mission church schools. Although it may be contended that the government is still participating too much in religion, events show that it is doing so less and less. It is now endeavoring to pursue primarily a policy of protecting religion, giving opportunity for students to participate in religious matters, but leaving religious activities to be carried on by the churches apart from the schools and at the same time leaving the students free to choose whether or not they will participate in religious activities. This is in harmony with the principles of our constitutional liberties.

on the ground having been repaired, Colonel S. F. Tappan, an army officer, was appointed superintendent. The school has grown until today it is one of the largest government Indian schools and may be considered a good example of the program carried on in such institutions.

²⁹ The Sunday school lessons used at the present time are issued by the Presbyterian church. It is felt by the school that they best fit their needs. The effort is made to make them nondenominational.

CHAPTER XV

ANTI-EVOLUTION LAWS

A QUESTION closely associated with the subject of religion in the public schools is represented by the so-called "anti-evolution" laws.

On March 5, 1921, the state of Utah passed the following law:

Section 1. It shall be unlawful to teach in any of the district schools of this state while in session, any atheistic, infidel, sectarian, religious, or denominational doctrine and all such schools shall be free from sectarian control.

Section 2. Nothing in this act shall be deemed to prohibit the giving of any moral instruction tending to impress upon the minds of the pupils the importance and necessity of good manners, truthfulness, temperance, purity, patriotism, and industry, but such instruction shall be given in connection with the regular school work.¹

It will be noted that this statute provides that no "atheistic" or "infidel" doctrines are to be taught in any of the district schools of the state of Utah. These are specifically designated in addition to the usual "sectarian," "religious," or "denominational" prohibitions. Section 2 permits "moral instruction," but such instruction must be given in connection with the regular school work.

In 1923 the House of Representatives of the state of Florida passed the following resolution, in which the Senate concurred:

That it is the sense of the legislature of the state of Florida that it is improper and subversive to the best interests of the people of this state for any professor, teacher, or instructor in the public schools and colleges of this state, supported in whole or in part

¹ Utah Laws, 1921, Chapter 95.

by public taxation, to teach or permit to be taught atheism or agnosticism, or to teach as true Darwinism, or any other hypothesis that links man in blood relationship to any other form of life.²

In March, 1925, the Tennessee anti-evolution law went into effect. It reads:

It shall be unlawful for any teacher in any of the universities, teachers' colleges, normal schools, or other public schools of the state which are supported, in whole or in part, by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man descended from a lower order of animals.³

Section 2345 provides that any teacher who violates the above statute shall be guilty of a misdemeanor and be subject to a fine of not less than \$100 nor more than \$500 for each offense.

It was under this statute that John Thomas Scopes, a teacher in the public schools of Rhea County, Tennessee, was indicted for denying the story of the divine creation of man as taught by the Bible and teaching instead that man descended from a lower order of animals. He was found guilty before the trial judge and fined one hundred dollars. Scopes appealed to the Supreme Court of Tennessee, which handed down, on January 15, 1927, a majority vote upholding the constitutionality of the statute. Prominent among the attorneys, numbering approximately a dozen on each side of the case, were Clarence Darrow, who defended Scopes, and William Jennings Bryan, who represented the state. Among the issues in the case was the question whether or not the anti-evolution act as passed by the Tennessee legislature violated the constitutional provision that "it shall be the duty of the general assembly . . . to cherish literature and science."⁴

² House Concurrent Resolution No. 7, House Journal, 1923, pp. 2200, 2201.

³ Code of Tennessee, 1932, Section 2344.

⁴ Constitution of Tennessee, Article 11, Section 12.

Did it violate the constitutional provision which declares "that no preference shall ever be given, by law, to any religious establishment or mode of worship"?⁵ Was it a violation of the fourteenth amendment of the constitution of the United States⁶ or of the Tennessee constitutional provision "that no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land"?⁷

Although the court held that the anti-evolution act did not violate the constitution, it did hold that the fine of one hundred dollars assessed by the trial judge was unconstitutional, since under the constitution of Tennessee a fine exceeding fifty dollars must be assessed by a jury. Inasmuch as the statute in question did not permit a fine smaller than one hundred dollars, there was no power in the Supreme Court to correct the error, and the judgment of the lower court was therefore reversed. The court suggested to the attorney-general that he make an entry of *nolle prosequi*, stating that "we see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the state . . . will be the better conserved" by dismissing the case.⁸ The attorney-general acted in accordance with the suggestion of the court and *nolle prossed* the action.⁹

Chief Justice Green gave the opinion of the court, Justice Cook concurred, and Justice Chambliss concurred with an extended opinion dealing with the theistic and materialistic

⁵ *Ibid.*, Article 1, Section 3.

⁶ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Constitution of the United States, fourteenth amendment, Section 1.

⁷ Constitution of Tennessee, Article 1, Section 8.

⁸ *Scopes v. State*, 154 Tenn. 105, 289 S. W. 363 (1927).

⁹ *New York Times*, January 22, 1927.

theories of evolution; Justice McKinney dissented.¹⁰ The court in the majority opinion said in speaking of Scopes:

He was under contract with the state to work in an institution of the state. He had no right or privilege to serve the state except upon such terms as the state prescribed. His liberty, his privilege, his immunity to teach and proclaim the theory of evolution elsewhere than in the service of the state was in no wise touched by this law.

The court pointed out further that the statute under consideration was not an exercise of the police power of the state in an attempt to regulate the conduct and contracts of individuals in their dealings with each other, but an act of the state as a "corporation, a proprietor, an employer . . . a declaration of a master as to the character of work the master's servant shall, or rather shall not, perform." If the legislature thinks that by reason of popular prejudice the courses of education in the study of science in general will be promoted by forbidding the teaching of evolution in the schools of the state, the court declared that it could conceive of no ground to justify its interference.

In the charge made that the act contravenes the provision of Section 3, Article 1, of the constitution providing that "no preference shall be given, by law, to any religious establishment or mode of worship," the court said:

We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. . . . Belief or unbelief in the theory of evolution is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of the prohibition laws.

Furthermore, Chapter 27 of the Acts of 1925 requires the teaching of nothing. It only forbids the teaching of the evolution of man from a lower order of animals.

¹⁰ Justice Swiggert took no part in the decision, since he had come on the bench during the trial, following the death of Justice Hall.

The law forbids teaching the theory of the evolution of man in the public schools of the state, but it does not require that anything contrary to that theory be taught. The court pointed out that if the school authorities felt that the statute so hampered the teaching of the science of biology, thereby preventing it from being a desirable course, they were at liberty to omit the course of biology entirely from the school curriculum; that if such a procedure was unfortunate, the misfortune must be charged to the legislature, for the validity of a statute must be determined by its moral and legal effect rather than by its proclaimed motives.¹¹

Although it is not within the power of the court to compel the legislature to pass any particular kind of law, positive or negative, it must be kept in mind that if the legislature passes an act that is unconstitutional, the court has not only the power but also the duty to declare such a law unconstitutional.

In the majority opinion the court held that the statute was not subject to attack on the ground of uncertainty. It said that the draftsman of the law used what in rhetoric is called "exposition by iteration," the purpose of the statute being to prohibit the teaching of the evolution theory, which teaching could be prevented by forbidding the teaching of any theory that denied the Bible story of creation. To make this purpose clear the law forbids the teaching that man descended from a lower order of animals.

Justice McKinney dissented from this opinion on the ground that the law in question was not sufficiently explicit to determine its actual meaning. It has been insisted that being a criminal statute it should be definite. It is maintained that there is danger that an intelligent man who entertains the view that the story of Genesis and the principles of evolution can be reconciled may interpret the statute too liberally. As it stands the statute is said to be too indefinite as to

¹¹ *Lockner v. New York*, 198 U. S. 45 (1905).

what it is that actually constitutes the "teaching of evolution." The evolutionist wonders just how suggestive of the evolution of man must be the facts to make the teacher a criminal under the Tennessee statutes. Will the medical teacher, for example, be barred from exhibiting blood tests from animals, including man, in the various positions in the scheme of classification, where the different species show relationships chemically which suggest to most students evolution from a common ancestry? So in teaching physiology, biology, or geology, just how far can the teacher go? Can he present all or any data supporting the theory of evolution, provided he does not make the inference?

It is urged that it is uncertain what facts, how strong an array of them, or how much useful information the teacher would have to present to make himself guilty of the crime. There is, therefore, a real basis for urging that the statute is void because of its indefiniteness.

There is also considerable evidence that it was a religious motive that prompted the passage of the act. Whether the legislature of a state, upon the theory of the complete separation of church and state, might properly enact such religious legislation and whether it might provide and regulate a curriculum for the schools of a state that might amount to direct mandatory control over the religious opinions and utterances of the teachers became significant questions.

The indictment against the teaching of the doctrine of evolution is that it contradicts the principles of religion and the story of creation as it is given in the Bible and that it ultimately leads to general unbelief. Such men are cited as Charles Darwin, Herbert Spencer, Thomas Henry Huxley, John Stuart Mill, H. G. Wells, and others who have emerged from their studies in science with their faith in God, and in the Bible as a divine revelation of His will, shattered. This position is strengthened by the fact that Clarence Darrow, who prides himself on being an agnostic, was the leading

counsel for Scopes and the one upon whom the modernists chiefly relied in the Tennessee trial. Thus the popular belief or suspicion seems to prevail that the intensive study of this branch of science generally results in agnosticism. However, outstanding scientists and theologians have signed and circulated statements expressing their belief that the theory of evolution is compatible with the facts of religion and a God of the universe, and that discrepancies between religion and science appear only because of positions taken by extreme evolutionists or they result from a lack of sufficient understanding of the subject.

If there is any justification for such a law, it must be on the ground that in the theory of the complete separation of church and state the state has no right to promote or to favor religion, but that it may only guarantee to everyone the free exercise of religion, thus preventing a concerted action against religion. This is best stated in the preamble to the concurrent resolution passed by the legislature of the state of Florida:

Whereas, the public schools and colleges of this state, supported in whole or in part by public funds, should be kept free from any teachings designed to set up and promulgate sectarian views, and should also be equally free from teachings designed to attack the religious beliefs of the public . . .¹²

On the contrary it is contended by some that if the doctrine of fundamentalism can be adopted by the state, by the same logic a Protestant legislature, for example, could pass a law compelling the teaching of the history of the Reformation and penalize a teacher who did not agree with and failed to teach the theses of Luther. A Catholic legislature, on the other hand, could pass a law requiring that the doctrine of transubstantiation be taught as a fact in the public schools. Such a procedure obviously would grossly violate the spirit of American republicanism and destroy

¹² House Concurrent Resolution No. 7, House Journal, 1923, pp. 2200, 2201.

the ideals that have attracted to our shores the oppressed of every land, the ideals that have made this country a priceless example to the world of the supreme satisfactions afforded by religious freedom.

The reports of some of the surveys made in the southern states reveal that the sentiment seems to be that the teaching of evolution should be definitely barred from the public schools. They allege that many of the teachers of biology in state-supported schools are teaching materialistic or theistic evolution. They deny the right to teach either of these views on the grounds that to teach materialistic evolution in the public schools is to teach infidelity, and that to teach theistic evolution is to teach a new, or sectarian, view of religion. The reports further show that many of the people of the South believe in the literal meaning and teaching of the Bible as the inspired Word of God, and that they oppose the teaching of any theory or view which weakens or destroys this faith in their children, especially when such teaching is at their own expense.

Justice Chambliss' opinion, which sustained the constitutionality of the act, practically limits the act to the prohibition of the teaching of materialism. As ordinarily taught, evolution is the theory of the gradual development of human and other life upon the earth. It does not undertake to determine the original cause, leaving that to religion and philosophy. It does not deny that God is the original cause, nor that the gradual development of life upon the earth is taking place in accordance with a divine plan. Materialism denies the existence of a God, or of a God as a Creator, who is concerned with the universe. Thus those who believe in God, in Christ, and in evolution find in the gradual development of life upon the earth additional evidence of a divine Creator. The position taken by Justice Chambliss permits the teaching of what he termed the scientific theory of evolution, essential to the teaching of biology.

In answering the contention that the statute violates the fourteenth amendment to the constitution of the United States, providing that no state shall "deprive any person of life, liberty, or property, without due process of law," and Article 1, Section 8, of the Tennessee constitution, providing that "no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land," the court, as we have seen, maintained there was little basis for such a contention. Scopes was a teacher in the public schools. He was an employee of the state of Tennessee or of a municipal agency of that state. He was under contract with the state to work in one of its institutions, and hence had no right to do other than serve under the terms that the state prescribed. His liberties and his privileges to teach the theory of evolution elsewhere than in the service of the state were in no wise affected by the present law. Finally, the statute under consideration was not an exercise of the police power of the state.

The police and proprietary powers are two entirely separate and distinct powers of the state. It has a different and much more complete control over the persons it employs in its own schools than over those employed in private schools. There are many things a state may do in the exercise of its proprietary power which could not be supported if done in the exercise of its police power. It would seem that without violating any constitutional rights the state may impose restrictions upon the liberties of its employees similar to those a private employer may impose.¹³

In the Tennessee case the court did not state whether it would have supported a similar statute, as coming within the police power of the state, if it had extended to all the schools of the state. This question did not fall within its pur-

¹³ This principle was clearly set forth in *Atkin v. Kansas*, 191 U. S. 207 (1903).

view, since the statute pertained to public schools only. The police powers, though never precisely defined by the courts, have generally been exercised only for the safety, health, morals, and general welfare of the public. It has been accepted that a *reasonable relation* must exist between the character of the legislation and these principles.¹⁴

That the state in the rightful exercise of its police power may punish those who abuse the freedom of speech guaranteed to them in the federal constitution, by utterances that are "inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace," was decided in *Gitlow v. New York*¹⁵ and is not open to question. To these decisions we may add those cases arising out of the National Espionage Act, which prohibits utterances made for the purpose of obstructing the recruiting of soldiers and sailors for the defense of the country in time of war.¹⁶

What position would be taken by our existent federal court with reference to the Tennessee evolution law is of course a question that is still to be determined. As a result of the *nolle prosequere* action of the attorney-general as recommended by the court, it is a question whether it is not impossible for the case to be carried to the Supreme Court before being heard by the Supreme Court of Tennessee.

In a discussion of the constitutionality of the Tennessee statute in the *Yale Law Journal*¹⁷ William Waller comments on the position the United States Supreme Court might be expected to take:

If the Tennessee statute were not confined to public institutions this decision [in the case of *Meyer v. Nebraska*, in which Justice McReynolds said, "His right thus to teach and the right

¹⁴ *Pierce v. Hill Military Academy*, 268 U. S. 510 (1925); *Meyer v. Nebraska*, 262 U. S. Sup. Ct. Rep. 390 (1923).

¹⁵ 268 U. S. 652, 69 L. ed. 1138 (1925); also *Fox v. Washington*, 236 U. S. 273 (1914); *Gilbert v. Minnesota*, 254 U. S. 325 (1920).

¹⁶ *Debs. v. U. S.*, 249 U. S. 211 (1919).

¹⁷ "The Constitutionality of the Tennessee Anti-Evolution Act," *Yale Law Journal*, December, 1925, pp. 191-200.

of parents to engage him so to instruct their children, we think, are within the liberty of the amendment."'] would doubtless be controlling. In the present day an enlightened and conscientious court would not hold that the teaching of evolution is "manifestly inimical" to the public welfare. As "police power" legislation it would be clearly invalid. But a more difficult question is whether the statute may not be sustained as an exercise of the state's proprietary control over public educational institutions.

The statute could hardly be said to "prescribe a curriculum." It does not abolish the teaching of certain scientific subjects and thus save that expense to the state. On the other hand, it assumes that they are still to be taught. No change whatever is made in any curriculum of any school. What the statute undertakes to do is to set aside a scientific doctrine which would naturally be taught as an integral and vital part of these subjects, and to substitute a standard of truth of its own. The public schools, state normal schools, and state university are thus deprived of their character of purely educational institutions, and are given the rôle of protectors of a partisan belief or dogma.

On March 11, 1926, Mississippi passed the following act:

It shall be unlawful for any teacher or other instructor in any university, college, normal, public school, or other institution of the state which is supported in whole or in part from public funds derived by state or local taxation to teach that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above-mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine that mankind ascended or descended from the lower order of animals.¹⁸

The statute provides that any teacher or textbook commissioner who is found guilty of violating this act is guilty of a misdemeanor and subject to a fine not to exceed five hundred dollars.¹⁹ The person so convicted must vacate the position held at the time of conviction.

In 1927 an anti-evolution bill was passed by the lower

¹⁸ Hemingway's Annotated Mississippi Code, 1927, Section 9493.

¹⁹ *Ibid.*, Section 9494.

house in Arkansas, but was tabled by the Senate. The following year the first anti-evolution initiative measure in history was approved, by a 45,000 majority, at the general election in Arkansas. The bill, which became effective on December 6 of that year, provides

that it shall be unlawful for any teacher or other instructor in any university, college, normal, public school, or other institution of the state which is supported in whole or in part from public funds derived by state or local taxation to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above-mentioned institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.²⁰

The statute also carried with it a penalty of five hundred dollars and dismissal from state service for violation. Thus Arkansas joined Utah, Florida, Tennessee, and Mississippi in placing upon her statute books an anti-evolution law.

In 1927 and 1928 it was predicted that anti-evolution bills would be introduced in many state legislatures, possibly as many as seventeen.²¹ Professor Arthur O. Lovejoy of Johns Hopkins University points out that those who are primarily interested in propaganda for the theory of evolution have no reason to regret the enactment of "anti-evolution" laws, for "nothing could do so much to advertise the subject and to arouse the intellectual curiosity of youth concerning the theory as such efforts to keep them from a knowledge of it."²² Those, however, who opposed teaching the theory of evolution because of the feeling that it is destructive of

²⁰ For a discussion of this act see "The Teaching of Evolution in Arkansas," *School and Society*, 28:677, 678 (December 1, 1928).

²¹ For other attempts to pass anti-evolution legislation see Maynard Shipley, "Growth of the Anti-Evolution Movement," *Current History*, 32:330-32 (May, 1930).

²² In the year 1926-27 anti-evolution bills were before the state legislatures of Arkansas, Georgia, Minnesota, Missouri, New Hampshire, Oklahoma, and West Virginia, none of which were enacted into law.

fundamental faith began an extensive warfare on the evolutionary hypothesis by making a concerted effort to ban textbooks teaching evolution from all state-supported schools and to bar instructors who believed and taught such principles.²⁸

Since then the friends of evolution have not been idle. There has been successful opposition to the spread of anti-evolution laws, many educators taking the stand that, whether the theory be true or not, legislation barring the discussion of evolution from the schools will not prove its truth or falsity. They hold that if the theory of evolution is true, then it should be studied in order that we may know more about mankind's advent into the world; and that if it is false, the surest way to detect its spuriousness is to allow light to be thrown upon it from as many unprejudiced minds as possible.

The fundamentalists contend that the customary way of teaching the evolutionary theory does not throw "light upon it from as many unprejudiced minds as possible." Whether this accusation by the fundamentalists be rational or not, the school administration can logically choose to do only one of three things: teach all sides of the controversy without prejudice; eliminate evolutionary textbooks and teachers; decide that the fundamentalists are superstitious or intellectually stagnant and proceed to teach the evolutionary hypothesis as truth without apology or restraint.

²⁸ "Anti-Evolution Laws and the Principle of Religious Neutrality," *School and Society*, February 2, 1929, pp. 133-38.

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PART III
SUNDAY LEGISLATION

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CHAPTER XVI

SUNDAY LEGISLATION

I. SUNDAY LAWS

THE QUESTION of Sunday laws and their enforcement has been an important one to all European and other Western governments ever since 321 A.D., when the first Sunday law was issued by the emperor Constantine. It was one of the chief issues of the early period of the United States. It continues to be important in our day, and indications are that it will receive increasing attention in the years to come.

Laws regulating the conduct of the people on the first day of the week were among the first enactments of the American commonwealths.¹ The manner in which such legislation has been treated by the courts forms a curious and interesting chapter in our constitutional history. At the beginning of our national history Sunday observance was enforced by the original thirteen states, which simply continued colonial legislation in this respect, each of the colonies having had an established religion. These Sunday laws have been copied and perpetuated in nearly all of the states of the Union. Attempts have been made to have similar laws passed by the federal government.²

¹ It should be noted that Rhode Island was an exception to this general rule. Even in Rhode Island, however, Sunday laws were passed at a later date, though never really enforced. To Roger Williams must be given the credit for establishing a society based upon the principles of complete separation of church and state.

² Of the numerous attempts to induce Congress to pass a Sunday law, the following, proposed for the District of Columbia, is a sample. On December 5, 1927, Mr. Lankford introduced in the House the following bill, "to secure Sunday as a day of rest in the District of Columbia, and for other purposes," which was referred to the committee of the District of Columbia, and ordered to be printed.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful in the District

To determine whether these Sunday laws are religious or civil as well as constitutional, it is necessary to consider their origin, the sentiment supporting them, the object for which they are enforced, and some of the court decisions concerning them. It has been stoutly maintained by some that Sunday laws are religious laws and so have no place in the legislation of a country whose government rests upon the principle of a separation of church and state. Others contend that they are simply civil and sanitary measures enacted for the benefit of the health and welfare of the people and that they represent a proper function of the police power of the state.

The first direct evidence of the religious character of Sunday of Columbia for any person, firm, corporation, or any of their agents, directors, or officers to employ any person to labor or pursue any trade or secular business on the Lord's day, commonly called Sunday, works of necessity and charity always excepted. It shall furthermore be unlawful in the District of Columbia for any person under employment or working for hire to engage in labor under such contract of employment or hire on the Lord's day, commonly called Sunday, except in works of necessity and charity.

"In works of necessity and charity is included whatever is needful during the day for the good order, health, or comfort of the community, provided the right to weekly rest and worship is not thereby denied. The labor herein forbidden on Sunday is hired, employed, or public work, not such personal work as does not interrupt or disturb the repose and religious liberty of the community. The following labor and business shall be legal on Sunday:

"(a) In drug stores for the sale of medicines, surgical articles, and supplies for the sick, foods, beverages, and cigars, but not for articles of merchandise forbidden on Sunday for other stores and merchants.

"(b) In hotels, restaurants, and cafes, and in the preparation and sale of meals.

"(c) For the sale of motor oil, gasoline, and accessories necessary to keep in operation cars in actual use on such Sunday, together with labor incident to such repairs.

"(d) In connection with public lighting, water, and heating plants.

"(e) For the operation of boats, railroad trains, street cars, busses, sight-seeing cars, taxicabs, elevators, and privately owned means of conveyance.

"(f) For telephone and radio service.

"(g) In dairies and in connection with preparation and delivery of milk and cream.

"(h) In connection with watching, caretaking, or safeguarding premises and property, and in the maintenance of police and fire protection.

"(i) In connection with the preparation and sale of daily newspapers.

"Section 2. That it shall be unlawful in the District of Columbia to keep open or use any dancing place, theater (whether for motion pictures, plays spoken or silent, opera, vaudeville, or entertainment), bowling alley, or any place of public assembly at which an admission fee is directly or indirectly received, or to engage in commercialized sports or amusements on the Lord's day, commonly called Sunday."

day laws is to be found in the Sunday law of Constantine, issued on March 7, 321 A. D. The *Encyclopaedia Britannica*³ says:

There is no evidence that in the earliest years of Christianity there was any formal observance of Sunday as a day of rest or any general cessation of work.

The earliest recognition of the observance of Sunday as a legal duty is a constitution of Constantine in 321 A. D., enacting that all courts of justice, inhabitants of towns, and workshops were to be at rest on Sunday (*venerabili die solis*), with an exception in favor of those engaged in agricultural labor.⁴

The law reads:

Let all judges and city people and all tradesmen rest upon the *venerable day of the sun*. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence, the favorable

"Section 3. It shall be unlawful in the District of Columbia for any person, firm, corporation, or any of their agents, directors, or officers to require or permit any employee or employees engaged in works of necessity and charity, excepting household or hotel service, to work on the Lord's day, commonly called Sunday, unless within the next six succeeding days during a period of twenty-four consecutive hours such employer shall neither require nor permit such employee or employees to work in his or its employ.

"Section 4. Any person who shall violate any of the provisions of this act shall, on conviction thereof, be punished by a fine of not less than \$5.00 nor more than \$50.00 for the first offense, and for each subsequent offense by a fine of not less than \$25.00 nor more than \$500.00 and by imprisonment in the jail of the District of Columbia for a period of not more than six months.

"Section 5. All prosecutions for the violation of this act shall be in the police court of the District of Columbia.

"Section 6. This act shall become effective on the sixtieth day after its enactment."

This bill, known as H. R. 78, the Lankford bill, was introduced on the first day of the 70th Congress as promised by the introducer at the previous session. It is the Jones Sunday bill of 1924 worked over and amended. It is similar to the bill Mr. Lankford introduced in the previous session of Congress.

³ Article on "Sunday" in the *Encyclopaedia Britannica*, 11th edition.

⁴ Subsequent laws were passed in 386, 401, 425. The principal purpose of these laws was to prevent sports and amusements on Sunday by prohibiting both work and play. Later still Sunday laws, such as those of Charlemagne, in 800 and 813, compelled all people to attend mass and church on Sundays and refrain from all servile labor. August Neander, *General History of the Christian Religion and Church*, translated by Joseph Torrey (London, 1850), 2:300. See also the article on "Sunday" in the *Americana*.

time should not be allowed to pass lest the provisions of heaven be lost.⁵

Thus the first Sunday law, the edict of the emperor Constantine, was the product of that pagan conception, developed by the Romans, which made religion a part of the state. The day was to be venerated as a religious duty owed to the god of the sun.

Chief Justice Clark, speaking for the Supreme Court of North Carolina, in a case involving the validity of a contract executed on Sunday, said:

Sunday was first adopted by Christians in lieu of Saturday long years after Christ, in commemoration of the Resurrection. The first "Sunday law" was enacted in the year 321 after Christ, soon after the emperor Constantine had abjured paganism, and apparently for a different reason than the Christian observance of the day. . . . Evidently Constantine was still something of a heathen. As late as the year 409 two rescripts of the emperors Honorius and Theodosius indicate that Christians then still generally observed the Sabbath (Saturday *not* Sunday). The curious may find these set out in full, Codex Just., lib. I, tit. IX, Cx 13. Not till near the end of the ninth century was Sunday substituted by law for Saturday as the day of rest by a decree of the emperor Leo (Leo Cons., 54).⁶

The same court, speaking further on this question, said:

Even if Christianity could be deemed the basis of our government [which is denied], its own organic law [for observing Sunday] must be found in the New Testament, and there we shall look in vain for any requirement to observe Sunday, or indeed any day.

The Saxon laws under Ine (about A.D. 700) forbade working on Sunday, but under Alfred (A.D. 900) and Athelstane (A.D. 924) the prohibition was merely against marketing on Sunday, and there seems to have been no statute against working on Sunday (whatever the church may have enjoined) until the above-

⁵ Codex Just., lib. III, tit. XII, 1, 3. Quoted in *Rodman v. Robinson*, 134 N. C. Rep. 510 (1904).

⁶ *Rodman v. Robinson*, *supra*.

cited statute, 29 Car. II, Ch. 7 (1678), the first part of which is almost verbatim our statute, Code Section 3782. See 4 Blk. Com., 63. Indeed, it appears from the records of Merton College, Oxford, that at its manor of Ibstone, in the latter part of the thirteenth century, contracts with laborers provided for cessation from work on Saturdays and holidays, but it was stipulated that work should be done in regular course on Sunday. Thorold Rogers, *Work and Wages*, Chapter 1.

In Pennsylvania the case of *Commonwealth v. Hoover App.*, in which the defendant had been arrested for buying a cigar on Sunday, the court said:

Sunday legislation is more than fifteen centuries old, and this "historic argument" is of value in construing existing law. "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of Middle Age legislation of the Holy Roman Empire. The English laws are the expansion of the Saxon, and the American are the transcript of the English". . . During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish theocracy. The English Reformation introduced, for the first time, the doctrine of the Fourth Commandment to the first day of the week.⁷

The above analysis of Constantine's Sunday law has never been questioned or overruled by our courts. To follow the history of the union of church and state and the introduction and enforcement of Sabbath or Sunday laws in detail would require too much space, but some events may be mentioned with which the inception of such laws is associated and through which they found their way into statutes.

At the outbreak of the Revolutionary War the seventeenth century Sunday law of 29th Charles II was the Sabbath law enforced in all the American colonies. It is regarded in legal circles as one of the immediate historical antecedents of our present Sunday legislation. This law of Charles II reads in part as follows:

For the better observation and keeping holy the Lord's day,

⁷ 25 Pa. Superior Ct. 134 (1904).

commonly called Sunday, bee it enacted . . . that all the lawes enacted and in force concerning the observation of the Lords day and repaireing to the church thereon be carefully putt in execution. And that all and every person and persons whatsoever shall on every Lords day apply themselves to the observation of the same by exerciseing themselves thereon in the duties of piety and true religion publicly and privately and that noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, business or worke of their ordinary callings upon the Lords day or any part thereof (workes of necessity and charity onely excepted) and that every person being of the age of fourteene yeares or upwards offending in the premisses shall for every such offence forfeit the summe of five shillings, and that noe person or persons whatsoever shall publicly cry shew forth or expose to sale any wares merchandizes, fruit, herbs goods or chattells whatsoever upon the Lords day.⁸

Some of the early Sunday laws, and even some of the present Sunday laws of some of the states, bear a marked similarity to this Sunday law of Charles II. Referring to the similarity to be found in these laws, the *Americana* says: "The act of Charles II (1676) was the law of the American colonies up to the time of the Revolution, and so became the basis of the American Sunday laws."⁹ The present Sunday law of South Carolina reads:

No tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day (commonly called the Sabbath), or any part thereof (work of necessity or charity only excepted); and every person being of the age of fifteen years or upwards, offending in premises, shall, for every such offense, forfeit the sum of one dollar.¹⁰

The present Sunday law of North Carolina reads:

On the Lord's day, commonly called Sunday, no tradesman, artificer, planter, laborer, or other person shall, upon land or

⁸ *The Statutes of England, 1235-1713*, second revised edition, Vol. 1, 29 Chas. II, Chapter 7 (printed for Her Majesty's Stationery Office, London, 1888).

⁹ "Sunday" in the *Americana*.

¹⁰ South Carolina Code of Laws, 1932, Chapter 82, Section 1732.

water, do or exercise any labor, business, or work of his ordinary calling, works of necessity and charity alone excepted, nor employ himself in hunting, fishing, or fowling, nor use any game, sport, or play, upon pain that every person so offending, being of the age of fourteen years and upwards, shall forfeit and pay one dollar.¹¹

The text of the laws themselves plainly shows that the object of Sunday laws is the enforcement of religion.

The religious origin of the present Sunday statutes of many of the states is revealed in such religious terms as "Lord's day," "Sabbath day," "Christian Sabbath," "worldly employment," "secular business," "holy time," "Sabbath observance," "Sabbath breaking," "profanation of Lord's day," "violate the Sabbath," and many similar expressions.

The first Sunday legislation in the area now occupied by the United States was issued by Virginia in 1610. It required that

Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechising, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death.¹²

In 1617 Virginia passed a law punishing a failure to attend church on Sunday with a fine payable in tobacco. As re-enacted by the general assembly in 1623 this law read as follows:

¹¹ North Carolina Code of Laws, 1931, Chapter 75, Section 3955. This section does not apply to the county of Cumberland (except to the city of Fayetteville) nor to the county of Robeson. Public Laws, 1921, Chapter 487; 1923, Chapter 506; 1925, Chapter 451.

On March 7, 1921, Section 3955 was so amended as to make the offender guilty of a misdemeanor and upon this conviction to be fined or imprisoned according to the discretion of the court. This act to apply to Cumberland County only.

¹² "Articles, Laws, and Orders, Divine, Politique, and Martial, for the Colony in Virginia: first established by Sir Thomas Gates, Knight, Lieutenant-General, the 24th of May, 1610. Again exemplified and enlarged by Sir Thomas Dale, Knight, Marshall, and Deputie Governour, the 22d of June, 1611." Reprinted at Hartford in 1876.

That whosoever shall absent himselfe from divine service any Sunday without an allowable excuse shall forfeite a pound of tobacco, and he that absenteth himselfe a month shall forfeit 50 lb. of tobacco.¹³

Thus Sabbath laws were placed on the statute books of the colonies at an early date.¹⁴

From the foregoing we see that Sabbath laws in England, especially during and after the Reformation period, and in America from the founding of the first colonies, have been based upon the laws of God. They were enacted as a purely religious institution and not as a civil one. No other day than the first day of the week has been regarded as having a sacred character. The Puritans, while they followed the precedent established by the law of Charles II, went even further than Charles in the stringency of Sunday observance required and in the penalties imposed. In some cases death was the punishment for breaking the Sabbath. The following law enforced by the Connecticut Puritans is typical of other Sunday laws of colonial days:

Whosoever shall profane the Lord's day, or any part of it, either by sinful servile work or by unlawful sport, recreation, or otherwise, whether wilfully or in careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature, and measure of the sinn, and offence. But if the court upon examination, by clear, and satisfying evidence find that the sin was proudly, presumptuously, and with a high hand committed against the known command and authority of the blessed God, such a person therein despising and reproaching the Lord, *shall be put to death*, that all others may feare and shun such provoking rebellious courses.¹⁵

In Maryland a law of 1723 provided

¹³ Hennings Statutes at Large: Virginia, 1619-1660, Act No. 2, Vol. 1, p. 123.

¹⁴ Act No. 3 passed by the assembly provided "that there be an uniformity in our church as neere as may be to the canons in England; both in substance and circumstance, and that all persons yeild readie obedience unto them under paine of censure." *Ibid.*

¹⁵ Law of 1656. Blakely, *American State Papers*, p. 42.

That no person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday, and that no person having children, servants, or slaves, shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day, (works of necessity and charity always excepted,) nor shall suffer or permit any children, servants, or slaves, to profane the Lord's day by gaming, fishing, fowling, hunting, or unlawful pastimes or recreations; and that every person transgressing this act, and being thereof convict by the oath of one sufficient witness, or confession of the party before a single magistrate, shall forfeit two hundred pounds of tobacco, to be levied and applied as aforesaid.

. . . where the said fines shall not be immediately paid on conviction, that it shall and may be lawful for the magistrates, or other officers aforesaid, and they are hereby required, to order the offender, not being a freeholder, or other reputable person to be whipped, or put in the stocks.

. . . no offender shall receive above thirty-nine lashes, or be kept in the stocks above three hours, upon any one conviction.

Section 1 of this law provided that blasphemers should be punished by being branded with the letter B and that those guilty of a third offense must suffer the death sentence:

That if any person shall hereafter, within this province, wittingly, maliciously, and advisedly, by writing or speaking, blaspheme or curse God, or deny our Saviour Jesus Christ to be the Son of God, or shall deny the Holy Trinity, or any of the Persons thereof, and shall be thereof convict by verdict or confession, shall, for the first offence, be bored through the tongue and fined twenty pounds sterling to the lord proprietor to be applied to the use of the county where the offence shall be committed, to be levied on the offender's body, goods, and chattels, lands or tenements, and in case the said fine cannot be levied, the offender to suffer six months' imprisonment without bail or mainprise; and that for the second offence, the offender being thereof convict as aforesaid, shall be stigmatized by burning in the forehead with the letter B and fined forty pounds sterling to the lord proprietor, to be applied and levied as aforesaid, and in case the same cannot be levied, the offender shall

suffer twelve months' imprisonment without bail or mainprise; and that for the third offence, the offender being convict as afore-said, shall suffer death without the benefit of the clergy.¹⁶

Such examples of colonial legislation¹⁷ may be multiplied indefinitely to show that all Sunday legislation from Constantine to William Penn was based on the supposition that the Lord's day is the divinely appointed Sabbath and was enacted to preserve the day from desecration.¹⁸

In Massachusetts the Supreme Court said:

Our Puritan ancestors intended that the day [referring to Sunday] should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time.¹⁹

Many of the court decisions, both before and after the adoption of our constitution, speak in positive terms of the religious character, object, and purpose of Sunday laws. In the case of *Brimhall v. Van Campen*,²⁰ in which the Supreme Court of Minnesota held that a note executed on Sunday was void under the Minnesota law prohibiting any manner of labor, business, or work on Sunday except works of charity or necessity, the court said: "This Sunday act can have no other object than the enforcement of the fourth of God's commandments. . . ."

¹⁶ All of the above act, consisting of fifteen sections, and those laws of Maryland that were considered applicable to the District of Columbia, were taken over and made a part of the laws of the District by act of Congress in 1801, when the District was taken over as the territory of the national capital. The above law has remained on the statute books of the District. In 1908, the Court of Appeals of the District set the Sunday law aside as "obsolete" and "repealed by implication." See Blakely, *American State Papers*, pp. 518, 519.

¹⁷ For colonial Sunday legislation, see *ibid.*

¹⁸ The Pennsylvania act of 1794 purported to be an ordinance for the enforcement of the Sabbath as a *civil* institution.

¹⁹ *Davis v. Somerville*, 128 Mass. 594 (1880).

²⁰ 8 Minn. 1 (1858).

Some of the courts, though attempting to evade the religious purpose of the Sunday laws, have nevertheless embodied in their opinions statements showing that the intent and purpose of the law was to "advance the interests of religion" and guard the "sanctity" of "the Lord's day" as "a time-honored and heaven-appointed institution." A few more instances in which the courts have regarded Sunday as a religious institution and recognized the day as one of holiness may be noted in passing.

In New York Chief Justice Kent stated that "the statute for preventing immorality consecrates the first day of the week as holy time. . . ." ²¹ The Massachusetts court gave as one reason for setting aside the day as "holy" the fact that "the legislative power or the uniform usage of every Christian state has exacted the observance of it as such." ²² The statute in Iowa sets Sunday apart as "sacred." ²³ Many other statutes carry such an interpretation. ²⁴

In 1834 a New York judge spoke of "the public order and solemnity of the day." ²⁵ In Pennsylvania a judge held that "the day itself is clothed with peculiar sanctity. . . ." ²⁶ Of two Kentucky statutes one applied "exclusively to Sundays as sacred, and the other to holidays as secular." ²⁷ In Iowa Sunday is "sacred, set apart for rest by the voice of wisdom, experience, and necessity. . . ." ²⁸ In referring to the Sunday laws in North Carolina the court said, "All religious and moral codes permit works of necessity and charity on their sacred days." ²⁹

It has been said by the Georgia court that "all courts

²¹ *People v. Ruggles*, 8 Johns. 290 (1811).

²² *Pearce v. Atwood*, 13 Mass. 324 (1816).

²³ *Davis v. Fish*, 1 Green 406 (1848).

²⁴ *Johnson v. The Commonwealth*, 22 Pa. St. 102 (1853); *Stockden v. The State*, 18 Ark. 186 (1856); *Corey v. Bath*, 35 N.H. 530 (1857); *Varney v. French*, 19 N.H. 233 (1848).

²⁵ *Boynton v. Page*, 13 Wend. 425 (1835).

²⁶ *Jeandelle's Case*, 3 Phil. 509 (1859).

²⁷ *Moore v. Hagan*, 2 Duv. 437 (1866).

²⁸ *Davis v. Fish*, 1 Green 406 (1848).

²⁹ *Ricketts' Case*, 74 N.C. 187 (1876).

should abstain from the transaction of ordinary business on that holy day.”³⁰ The Supreme Court of Mississippi, in considering the case of *Kountz v. Price*,³¹ in which a Sunday law was involved, said it was “intended to promote public morals, and to induce the observance of the duties of religion in society . . .”

The Supreme Court of Alabama, in considering a statute prohibiting worldly business on Sunday, made the following statement:

We do not think the design of the legislature in the passage of the act can be doubted. It was evidently to promote morality and advance the interest of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday . . .³²

In 1894 Judge Alvey of the Supreme Court of Maryland, in speaking of the Sunday laws in the different states, said: “They are substantially the same in their general scope and provision—all looking to keeping the day sacred . . .”³³ In the same year Judge Boyd, in considering the *Judefind* case, said:

Article 36 of our Declaration of Rights guarantees religious liberty; but the members of the distinguished body that adopted that constitution never supposed they were giving a death blow to Sunday laws by inserting that article. Those laws do not prohibit or interfere with the worship of God on any day other than Sunday . . .

It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion . . .

There are many most excellent citizens of this state who worship God on a day other than Sunday, and our constitution guarantees to them the right to do so, a right which no one can interfere with.³⁴

³⁰ *Gholston v. Gholston*, 31 Ga. 625 (1860).

³¹ 40 Miss. 341 (1866).

³² *O'Donnell v. Swceney*, 5 Ala. 467 (1843).

³³ 56 Md. 209.

³⁴ *Judefind v. State*, 78 Md. 510 (1894).

In the case of *Karwisch v. The Mayor and Council of Atlanta*³⁵ the plaintiff had been convicted before the mayor of Atlanta for keeping open his store on Sunday. The Supreme Court of Georgia said: "The law fixes the day recognized as the Sabbath day all over Christendom, and that day, by divine injunction, is to be kept holy—'on it thou shalt do no work.'"

In 1848 it was stated by the Supreme Court of Iowa that Sunday has been "established by laws, both human and divine, for public worship and private devotion, . . . a time-honored and heaven-appointed institution."³⁶

It is obvious from the statements quoted, which are only a few of the many that might be selected, that the statutes dealing with Sunday legislation and the decisions of the courts in cases involving these statutes regard Sunday as a religious institution, which attitude makes it difficult to deal with Sunday legislation as a "civil institution." This effort to "sanctify" or "consecrate" a particular time arrogates ecclesiastical functions to American legislatures, which are not commonly ascribed to them in the American theory of jurisprudence.

Without exception where Sunday laws have been upheld, the "immorality," "vice," and "sin" consist not in the acts themselves but in the doing of them on Sunday. The difficulty with this is that Sunday labor, etc., must then be regarded by our secular courts just as an ecclesiastical tribunal would regard boisterous behavior in a church or an unauthorized intrusion upon a sanctuary as was expressed by the Supreme Court of Minnesota in considering the Sunday law statute of that state: "The law is not enforced for the benefit of either, but to prevent a desecration of the day."³⁷

This point of view was also well expressed by Chief Justice English of the Supreme Court of Arkansas when he said:

³⁵ 44 Ga. 205 (1871).

³⁶ 1 Green 406 (1848).

³⁷ *Brckett v. Edgerton*, 14 Minn. 134 (1869).

The object of the statute was to prohibit the *desecration* of the *Sabbath* by engaging in the vicious employment of playing *cards* on that day, which is set apart by divine appointment, as well as by the law of the land, for other and better engagements; and whether the defendant played for a wager or amusement, he is alike guilty of a desecration of the Sabbath, and consequently of a violation of the law. The playing *cards* upon *that day* is the gist of the offense, and whether the playing be for a wager or amusement is not material.⁸⁸

The language used by Judge English in the above opinion is unmistakable; it states clearly that the object of the Sunday statute in Arkansas is to enforce the observance of the Sabbath. It will be noted that the offense committed is not the act of playing cards but the act of playing cards *on Sunday*. A man may be punished for committing a nuisance on Sunday, but he is not punished because of the fact of having committed it on Sunday. American law makes no distinction between Sunday and any other day when a nuisance has been committed.

The Supreme Court of Indiana in considering the power of the legislature of that state to enact a Sunday law summarized it in the following words:

When our existing government was created, its creators determined that there were some matters in which the majority should not control the minority; that there were some things over which the legislature should not have authority; that in some things the people should not be within the power of the legislature. Such is our organization of government—our constitution. One of the subjects withdrawn by that constitution, in the Bill of Rights, from legislative interference, is that of religion; and the writer has no hesitation in saying, highly as he individually values the Sabbath, that if the *Sunday* law is upon the statute book for the protection or enforcement of the observance of that day, as an institution of Christian religion, it cannot be upheld; no more than could a law forbidding labor on *Saturday*, the Jewish Sabbath, or on any and all other days of the week, which may be,

⁸⁸ Stockden v. State, 18 Ark. 186 (1856).

in fulfillment of a requirement of a creed, set apart for religious observance, by any portion of our citizens, whether Christian, Jewish, Mohammedan, or pagan.³⁹

The question of Sunday barber shops has frequently been carried to the courts. In the Utah case of *State v. Sopher*,⁴⁰ which was a prosecution against Sopher for keeping his barber shop open on Sunday (the Sunday law of Utah allows livery stables, restaurants, boarding houses, and bath houses to be open on Sunday), the court held that the law was not unconstitutional in prohibiting barbering on Sunday on the ground that it was not a work of necessity. While some states permit barber shops to be open on Sunday, at least until some designated hour,⁴¹ the courts have held in a number of cases that the operation of a barber shop on Sunday is not a necessity within the intent of the law.⁴²

In both Illinois and Missouri it has been held that a special law against Sunday barbering is unconstitutional, as depriving barbers of property without due process of law and as being in effect class legislation. The Illinois court said that "when the legislature undertakes to single out one class of labor, harmless in itself, and condemn that and that alone, it transcends its legitimate powers, and its action cannot be sustained."⁴³ In Michigan the court held valid a special law against Sunday barbering, with an exception in favor of those

³⁹ *Thomasson's Case*, 15 Ind. 449 (1860); see also *Melvin v. Easley*, 7 Jones 356 (1860); *Frolickstein v. Mayor of Mobile*, 40 Ala. 725 (1867); *Bott's Case*, 31 La. Ann. 663 (1879); *Cline v. State*, 9 Okla. Crim. Rep. 40; *Swann v. Swann*, 21 Fed. Rep. 299 (1884); *Andrews v. Bible Society*, 6 Sandf. (N. Y.) 156 (1850); *Ayres v. Methodist Church*, 5 Sandf. (N. Y.) 351-77 (1849); *State v. Powell*, 58 Ohio St. 324, 41 L. R. A. 854 (1898); *Slaughter-house Cases*, 16 Wall 36, 62; *Bloom v. Richards*, 2 Ohio St. 387 (1853).

⁴⁰ 25 Utah 318 (1902).

⁴¹ The state of New York, for example, has a law allowing barber shops to be open on Sunday in the city of Saratoga until one P. M.

⁴² *State v. Frederick*, 45 Ark. 347 (1885); *Commonwealth v. Dextra*, 143 Mass. 28 (1886); *Commonwealth v. Waldman*, 140 Pa. St. 89 (1891); *Ex parte Kennedy* (Tex.), 58 S. W. 129 (1900); *State v. Petit* (Minn.), 77 N. W. 225 (1898); *Petit v. Minnesota*, 177 U. S. 164 (1900); *Gray v. Commonwealth*, 171 Ky. 269 (1916).

⁴³ *Eden v. People*, 161 Ill. 296 (1896); for Missouri see *State v. Granneman*, 132 Mo. 326 (1895).

groups who observe the seventh day of the week as a day of rest.⁴⁴

In California the court held that an act making it a misdemeanor to keep open and conduct a barber shop, bath house, or hairdressing parlor, or to work as a barber on Sunday or other holidays, is undue restraint of personal liberty and constitutes special legislation—that it is not a proper exercise of the police power and is unconstitutional.⁴⁵

II. SUNDAY AMUSEMENTS

Another class of activities that frequently comes into conflict with a particular branch of the Sunday laws includes outdoor amusements, sports, games, and exercises on Sunday. In Massachusetts it was held that Sunday law statutes, being criminal, are to be construed strictly and cannot be enlarged by implication.⁴⁶ The Massachusetts court held that a religious or Christian society may lawfully give a public vaudeville entertainment on the Lord's day if the excess of receipts over expenses is to be devoted to a charitable purpose.

In 1900 the Supreme Court of Missouri in construing a Sunday law forbidding the playing of "games of any kind on Sunday" used the following language:

Until the lawmakers expressly provide for such sweeping changes in the lives and customs and habits of our people, it is not proper for the courts by construction to impair their natural rights to enjoy those sports or amusements that are neither *mala in se* nor *mala prohibita*—neither immoral nor hurtful to body or soul.⁴⁷

In 1910 the Supreme Court of Idaho in construing Section 6825 of the Idaho statutes, which prohibits public amusements on Sunday, in effect decided that "an amusement that is not *per se* unlawful or criminal and is not in itself immoral

⁴⁴ *People v. Billet*, 99 Mich. 151 (1894).

⁴⁵ *Ex parte Jentzsch*, 112 Calif. 468 (1896).

⁴⁶ *Commonwealth v. Simon Alexander*, 185 Mass. 551 (1903).

⁴⁷ *Ex parte Joseph Neet*, 157 Mo. 527, 80 Am. St. Rep. 638 (1900).

or dangerous or detrimental to the public health will not be included within the provisions of the statute prohibiting certain specified public amusements and other like and similar amusements on Sunday . . . ”⁴⁸

The Supreme Court of New Mexico, also, decided that the playing of baseball on Sunday is not a sport or labor within the meaning of the Sunday law statute prohibiting labor or sports on the first day of the week.⁴⁹

In the case of *People v. Poole et al.*, which was a prosecution by the state of New York charging Poole with violation of the statutes prohibiting public sports on Sunday, Judge Gaynor, who gave the opinion for the court, said:

Physical exercises and games are not forbidden on the Sabbath in the Ten Commandments. Only work is there prohibited. . . . Moreover, this commandment [referring to the fourth] relates to the seventh day of the week, and not to the first. In the New Testament there is no Sunday law at all.

And if we view the statute as a health law, we shall still not perceive any intention in it to prohibit all out-of-door games and exercises on Sunday, for to prevent them, especially in the cities, would injure the health of the community and materially increase the death rate.⁵⁰

The Criminal Court of Appeals of Oklahoma decided in 1921 that to conduct moving picture shows on Sunday is not “servile labor” within the intent of the statutes. Section 2405 of the Oklahoma Statutes of 1910, under which the following decision was rendered, is the same law that is in force in Oklahoma today, as given under Section 1825 of the Oklahoma Statutes of 1921. The statute in question prohibited “servile labor” except works of necessity or charity on the Sabbath. The respondent, Clint Smith, was informed against for breaking the Sabbath by selling tickets for a moving picture performance. Demurrer to the information was sustained, that the facts set forth in the information did not con-

⁴⁸ In *re* G. W. Hull, 18 Idaho Rep. 475 (1910).

⁴⁹ *New Mexico v. Thos. M. Davenport*, 17 N. Mex. Rep. 214 (1912).

⁵⁰ 89 N. Y. S. 773 (1904).

stitute "servile labor" as contemplated by the laws of the state of Oklahoma. The state appealed the case from the county court to the Criminal Court of Appeals. Justice Bessey, in delivering the opinion, said:

A Sunday law should not be a religious or an ecclesiastical act to promote religious doctrine, or religious rites or ceremonies. Ours is purely a civil government, which guarantees to every person the right to espouse and practice any religious creed he may choose, or to espouse and practice none.

We therefore come to the conclusion that the operation of a moving picture show is not "servile labor," and not prohibited, within the meaning of this portion of our Sunday statute, and the order of the court, sustaining the demurrer to the information, is sustained, and the cause ordered dismissed.⁵¹

It may be said that in the past, and still today in many instances, certain sections of these Sunday laws have prevented these amusements and recreations from taking place on Sunday. In the case of *Hiller v. State*,⁵² it was held that an ordinance of the city of Baltimore prohibiting the playing of baseball on Sunday—even though played in a secluded part of a large natural park out of sight of houses, without any reward for playing or charge for admission but merely as recreation and in a quiet and peaceful manner, without noise or conduct disturbing the public peace—was within the proper exercise of the police power and not contrary either to Article 36 of the Declaration of Rights, guaranteeing religious freedom, or the fourteenth amendment of the federal constitution, protecting the civil rights. The ordinance above referred to was passed in 1827, and is as follows:

Any person who shall fish, hunt, pitch quoits or money, fly a kite, play bandy or ball, or any other game or sport upon the Sabbath day within the limits of the city shall for each offense pay a fine of one dollar . . .

⁵¹ *State v. Smith*, 198 Pac. Rep. 879; see also *Blinkley v. State*, 198 Pac. Rep. 884; *Ramsey v. State*, 198 Pac. Rep. 886; *State v. House*, 198 Pac. Rep. 888; *Treese v. State*, 198 Pac. Rep. 889 (1921).

⁵² 124 Md. 385 (1914).

It seems that this game was played on what was then called Druid Hill Park, consisting of one hundred acres of land in the middle of the forest of the park. Justice Burke, speaking for the court, said:

It is now generally held that laws and ordinances of this character are passed in the exercise of the police power, and it must be admitted that the state and the city have the power to pass all proper laws and regulations of this nature.⁵³

In some places baseball playing is permitted in the afternoon, when it will not conflict with the church services held in the morning; or, if church services are held at some other hours, it is prohibited during that time—thus showing the religious motives back of such laws. It is difficult to see how such prohibitions can properly come under the police power, since they are not in themselves “immoral” or “detrimental” to “public health.”

III. INCONSISTENCIES IN SUNDAY LEGISLATION

Strange anomalies frequently exist in the laws dealing with Sunday legislation. The legislature of the state of Mississippi, for instance, when it enacted Senate Bill No. 87 at the legislative session of 1926, prohibited meat markets in municipalities of over five thousand population from selling

⁵³ The constitution of Maryland stipulates: “That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law, to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace, or safety of the state, or shall infringe the laws of morality, or injure others in their natural, civil, or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain any place of worship or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor in this world or the world to come. (Article 36.)

“That no religious test ought ever to be required as a qualification for any office of profit or trust in this state, other than a declaration of belief in the existence of God . . .” (Article 37.)

meat on the first day of the week. If it was made under the police power, was it for the "health of the individual," the "welfare of the community," the "public safety," or "public morals"? Our courts have said that before enacting a law involving the exercise of the police power the legislature must ask itself these questions: Is there a threatened danger? Does the regulation involve a constitutional right? Is the regulation reasonable? Applying these tests to the Mississippi law, one asks: If it is a health law why not protect the health of the people who happen to live in a city or village of less than five thousand population? Why allow people who live in municipalities of five thousand or under to buy meat and prohibit those who live in larger municipalities from doing so? If meat buying is undesirable on Sunday in a municipality of five thousand or under, why is it not undesirable in all municipalities? According to this law, it is the size of the community that determines whether it is wrong to buy meat on Sunday.

In Massachusetts⁵⁴ the court held that delivery of bread by the baker or his employee at the customer's place of business on the Lord's day is a violation of its Sunday law, which prohibits any manner of work except works of necessity and charity. The court said:

The statute prohibiting the performance of labor, business, or work, except works of necessity and charity, on Sunday, was enacted to secure respect and reverence for the Lord's day. "That the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements."

In the case of *Commonwealth v. Crowley*,⁵⁵ respondent was found guilty because he sold bread on Sunday. The law allowed bakers but no one else to sell bread. If he baked the bread himself he could sell it on Sunday, but if someone

⁵⁴ *Commonwealth v. McCarthy*, 244 Mass. 484 (1923).

⁵⁵ 145 Mass. 430 (1887).

else baked it and he bought it from him, he could not sell it on Sunday.

Nebraska allows bath houses to be open on Sunday until twelve o'clock noon.⁵⁶

In a New York case⁵⁷ the respondent was prosecuted for fishing in a pond and was convicted. The pond was private property, belonging to a club of which he was a member. Section 265 of the Penal Code of New York stipulates that "all shooting, hunting, fishing, playing, horse racing, gaming, or other public sport, exercises, or shows upon the first day of the week, and all noise disturbing the peace of the day, are prohibited." The court held that this provision prohibits fishing, that its prohibition is absolute, forbidding fishing on Sunday anywhere in the state and under all circumstances. Three of the judges of the highest appellate court voted that the offense consisted in the mere act of fishing, regardless of whether it interrupted "the repose and religious liberty of the community." The fourth judge concurred on the ground that the act did "constitute a serious interruption of the repose and religious liberty of the community." Three of the judges dissented from the above view. It would appear that the three judges who decided "that the offense was made out by the mere act of fishing, regardless of whether it interrupted the repose of the community" had a high regard for the religious discipline of the fish, and therefore did not wish to see them depraved on Sunday by being tempted with a delicious looking bait.

The Supreme Court of Minnesota has made the following distinction with respect to what may be sold on Sunday as a necessity without violating the Sunday laws of the state.⁵⁸ The court held that the selling of tobacco was not a violation of the statute which allows necessities to be sold on the Sabbath day, but that meat, groceries, and clothing could not

⁵⁶ 26 Nebr. 464 (1889).

⁵⁷ *People v. Moses*, 140 N. Y. 214, 35 N. E. 499 (1893).

⁵⁸ *State v. Justus*, 91 Minn. Rep. 447, 98 N. W. 325 (1904).

be sold. It is evident that the court considered tobacco to be a greater necessity than meat, groceries, and clothing; that the selling of tobacco was a necessity and the selling of meat a misdemeanor. If a person is required to buy his meat on the preceding day or night, might he not as well be required to buy his tobacco at the same time? These are only a few of the many opinions which our courts have expressed in an effort to uphold Sunday laws but which have sometimes put them into embarrassing positions later.

Although many opinions have been cited, and many more might be cited, in which the courts have upheld the constitutionality of Sunday laws, it should not be assumed that all court decisions have upheld such legislation; on the contrary, the decisions given in a number of court cases have not upheld Sunday laws, and in others strong dissenting opinions have expressed opposition to such legislation. While an array of authorities can be marshaled in support of Sunday laws of uniform operation, they are by no means agreed on a single principle upon which to base such laws. Frequently judges carry with them to the benches religious prejudices derived from early training. Such bias has prevented the carrying out of the philosophy of perfect religious freedom. It is time, however, that the courts recognize that true religion is never advanced but always injured by enlisting in its behalf the punishments and rewards of secular powers.

IV. SUNDAY LAWS AND THE POLICE POWER

As we have seen in many of the cases requiring an interpretation of the law, the courts have endeavored to establish that the object of Sunday laws (under the police power) is the preservation of good morals and the peace and good order of society, and not to emphasize the religious significance of the day. Some of these decisions have been based upon the necessity of physical benefits, some upon religious principles, and still others upon a strange combination of the two.

Police power has been defined as the inherent power of the state to prohibit all things hurtful to the comfort, safety, and welfare of society. It may be exercised to control the use of property of corporations as well as that of private individuals.⁵⁹ It may be extended to prevent needless destruction of property and to protect life.⁶⁰ It may be exercised in aid of what is sanctioned by usage or is held by the prevailing morality or strength and preponderant opinion to be greatly and immediately necessary to the public welfare.⁶¹

The Supreme Court of the United States in 1905 reversed the judgment of the New York court in the *Lockner* case.⁶² The federal court held that the labor law of New York limiting the hours of labor in bakeries was not a proper exercise of the police power. The New York court had upheld the constitutionality of the law on the ground that the stipulation as to the hours of labor in bakeries was a measure for the protection of public health and a safeguard to the individuals who followed the occupation of bakers. Justice Peckham of the United States Supreme Court, in speaking for the court, said:

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.⁶³

In answer to the arguments presented by the plaintiff in the above case, that the law was a health measure enacted in the interest of the state, to aid in making its people strong and robust, and therefore came under the police power, the court said:

⁵⁹ *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1873); *Brass v. North Dakota ex rel. Stoesser*, 153 U.S. 391 (1893); *Budd v. New York*, 143 U.S. 517 (1891).

⁶⁰ *John S. Thorpe v. Rutland and Burlington R.R. Co.*, 27 Vt. 140 (1854).

⁶¹ *Noble State Bank v. Haskell*, 219 U.S. 104 (1911).

⁶² *Joseph Lockner v. New York*, 198 U.S. 45, 49 L. ed. 937 (1905).

⁶³ *Ibid.*

If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the federal constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions . . . The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals . . .

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.

In the case of *Mugler v. Kansas*, the court said:

If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.⁶⁴

Where the ostensible object of an enactment under the police power is to secure the public comfort, welfare, or safety, it must appear to be adopted to that end. It cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact.⁶⁵ In *Eden v. State of Illinois*,⁶⁶ which was a prosecution for a violation of the Sunday law making it unlawful to do barbering on Sunday, the court in passing on the question of the relation of police regulation to health said:

How, it may be asked, is the health, comfort, safety, or welfare of society to be injuriously affected by keeping open a barber shop on Sunday? It is a matter of common observation that the barber business . . . is both quiet and orderly.

⁶⁴ 123 U.S. 623 (1887).

⁶⁵ *Ritchie v. People*, 155 Ill. 98 (1895); *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (1869); *Railroad Co. v. Jacksonville*, 67 Ill. 37 (1873); *People v. Gillson*, 109 N.Y. 389 (1888); *Millett v. People*, 117 Ill. 294 (1886); *Calder v. Bull*, 3 Dall. 386 (1798); in *re Jacobs*, 98 N.Y. 109 (1885).

⁶⁶ 161 Ill. 296 (1896).

The court referred to the case of Toledo, Wabash & Western R. R. Co. v. City of Jacksonville (67 Ill. 37), where it was held that if the law prohibits that which is harmless in itself or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will in such case be an unauthorized exercise of police power, and it will be the duty of the courts to declare such legislation void.

The Supreme Court of the state of Nebraska held that an act defining what shall constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state except those engaged in farming and domestic labor and making a violation of the act a misdemeanor was unconstitutional and void, because said act attempted to prevent persons legally competent from entering into contracts.⁶⁷

In the state of Illinois a man by the name of Steele was prosecuted for speculating in theater tickets on Sunday under a statute that had been enacted under the so-called "police power." The court held that to prevent speculation in theater tickets under this law was unconstitutional, since it had no relation to the public health, safety, morals, or welfare of the community.

The right of citizens to pursue an ordinary calling is a part of their right of liberty and property, and any law which prevents or abridges this privilege is obnoxious to the constitutions of this state and the United States.⁶⁸

Judge Cox, speaking for the Supreme Court of Indiana regarding Sunday laws and police power, said:

Sunday laws, which are an invasion of natural private rights, are enacted under this power.⁶⁹

⁶⁷ Low v. Rees Printing Co., 41 Nebr. 127 (1894).

⁶⁸ People of Ill. v. Steele, 231 Ill. 340 (1907); see also: Bessette v. People, 193 Ill. 334 (1901); Chicago v. Netcher, 183 Ill. 104 (1899); Ritchie v. People, 155 Ill. 98 (1895); Coal Co. v. People, 147 Ill. 66 (1893); Frorer v. People, 141 Ill. 171 (1892); Wice v. C. & N. W. Ry. Co., 193 Ill. 351 (1891); Gunning Sys. v. Chicago, 214 Ill. 628 (1905); Powell v. Penn., 127 U.S. 678 (1887).

⁶⁹ Carr v. State of Indiana, 175 Ind. 241 (1911).

The police power, vague and vast as it is, has its limitations. It does not justify any act that violates the prohibitions, expressed or implied, of the state or federal constitution. The maxim *Sic utere tuo ut alienum non leadas*—So use what is yours as not to injure another—defines and exhausts the whole police power of a free American government. Under that power it may deal with action and inaction so far as they affect the relations of the citizens to each other or treason, etc. It should not go beyond these limitations. A government that undertakes to do more than this ceases to be free and becomes paternal and despotic.

V. EXEMPTIONS FOR SEVENTH-DAY OBSERVERS

Frequently in states that have Sunday laws prohibiting "common labor on Sunday" an exception is made of those who conscientiously observe the seventh day of the week or some other as their Sabbath. In Indiana the court held that even if the seventh-day observers are not exempted from the operation of the Sunday laws, they do not violate such laws when they work on Sunday.⁷⁰ In rendering its opinion the court said:

The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and the seventh day of the week. One or the other of these days they must refrain from common labor. Which it shall be is to be determined by their own consciences. It was not the purpose of the lawmakers to compel any class of conscientious persons to abstain from labor upon two days in every week. Without the proviso which is said to break down the law, a large number of citizens would be compelled to lose two days of labor. One day, because of their conscientious convictions of religious duty, and one by the command of the municipal law. We know that there are sects of Christians who conscientiously believe the seventh day to be the divinely ordained Sabbath. We know, too, that there is a great people, who, for many centuries, and through relentless persecu-

⁷⁰ *Johns v. State*, 78 Ind. 332 (1881).

tion and terrible trials, have clung with unswerving fidelity to the faith of their fathers that the seventh day is the true Sabbath. If the proviso were wrenched from the statute, these classes of citizens would be compelled, in obedience to their religious convictions, to rest from labor on the seventh day, and, by the law, also compelled to refrain from common labor on the first day of the week. A leading and controlling element of our system of government is that there shall be absolute freedom in all matters of religious belief.⁷¹

In discussing the exemption of those who observe another day, Ernst Freund in his work entitled *Police Power* says:

All laws should scrupulously respect the principle of religious equality; and as experience shows that the exemption within the bounds indicated is quite feasible, it should be recognized as a constitutional right.⁷²

The Ohio courts have declared that a statute without exemption for seventh-day observers would not be valid.⁷³

It has been decided in several cases that any statute that attempts to compel the observance of the first day of the week as a religious duty will be unconstitutional and void.⁷⁴

In an Ohio case Judge Thurman, in delivering the opinion upholding a Sunday law merely as a municipal regulation under the police power, said:

The statute upon which defendant relies prohibiting common labor on the Sabbath could not stand for a moment as a law of this state, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty.⁷⁵

In the case of *Ex parte Koser*,⁷⁶ the California court said that

⁷¹ Sustaining these views see *City of Cincinnati v. Rice*, 15 Ohio 225 (1846); *City of Canton v. Nist*, 9 Ohio St. 439 (1859).

⁷² Ernst Freund, *Police Power, Public Policy and Constitutional Rights* (Chicago, 1904), p. 502.

⁷³ *City of Cincinnati v. Rice*, *supra*.

⁷⁴ *Swann v. Swann*, 21 Fed. Rep. 299 (1884); *State v. Judge*, 39 La. 132 (1887).

⁷⁵ *Bloom v. Richards*, 2 Ohio St. 387 (1853).

⁷⁶ 60 Calif. 177 (1882).

If it once be admitted that the legislature has power to thus provide [by the passing of Sunday laws] for the public health and good morals, where is the limit to its exercise? And if the public health can thus be provided for, what is the objection to laws prohibiting the use or the culture of tobacco, or even tea or coffee, as injurious to health? . . . there would be just as much propriety in enacting the number of hours out of the twenty-four during which all should sleep, on pretense of compelling a restoration of exhausted energies, as in prescribing the number of hours in every week during which all must refrain from their ordinary avocations.

In upholding certain Sunday laws as a civil regulation on the ground that one day's rest in seven is necessary for the health and moral well-being of the citizens, Sunday has been compared with the Fourth of July and other holidays. But it would appear that there is a difference between setting Sunday aside as a day of rest with a penalty attached for violation thereof and setting aside the Fourth of July or any other holiday which has no penalty attached—one with a penalty and the other with no penalty. Our courts have held that where infliction of a penalty for the commission of an act is imposed, the same is equivalent to an expressed prohibition of such an act. In other words, if there is no penalty, then the act is not strictly prohibited. Penal statutes are construed strictly.

A court in California held that an act making it a misdemeanor to keep open and conduct a barber shop, bath-house, or hairdressing parlor, or to work as a barber on Sunday or other holidays is an undue restraint of personal liberty and is special legislation—an improper exercise of the police power—and is unconstitutional. In passing on the questions presented in this case the court said:

In this state they [Sunday laws] have never been upheld from a religious standpoint. Under a constitution which guarantees to all equal liberty of religion and conscience, any law which forbids an act not in itself *contra bonos mores*, because that act is repug-

nant to the beliefs of one religious sect, of necessity interferes with the liberty of those who hold to other beliefs or to none at all.

Liberty of conscience and belief is preserved alike to the followers of Christ, to Buddhists and Mohammedans, to all who think that their tenets alone are illumined by the light of divine truth; but it is equally preserved to the skeptic, agnostic, atheist, and infidel, who says in his heart, "There is no God."

Still, it may be suggested in passing that our government was not designed to be paternal in form. We are a self-governing people, and our just pride is that our laws are made by us as well as for us. Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows. Our constitutions are founded upon the conviction that we are not only capable of self-government as a community, but what is the logical necessity, that we are capable, to a great extent, of individual self-government. If this conviction shall prove ill founded we have built our house upon the sand. The spirit of a system such as ours is, therefore, at total variance with that which, more or less veiled, still shows in the paternalism of other nations. It may be injurious to health to eat bread before it is twenty-four hours old, yet it would strike us with surprise to see the legislature making a crime of the sale of fresh bread. We look with disfavor upon such legislation as we do upon the enactment of sumptuary laws. We do not even punish a man for his vices, unless they be practiced openly, so as to lead to the spread of corruption, or to breaches of the peace, or to public scandal. In brief, we give the individual the utmost possible amount of personal liberty, and, with that guaranteed him, he is treated as a person of responsible judgment, not as a child in his nonage, and is left free to work out his destiny as impulse, education, training, heredity, and environment direct him.

The court, in stating the law in regard to a man's constitutional rights and freedom, said:

A man's constitutional liberty means more than his personal freedom. It means, with many other rights, his right freely to labor, and to own the fruits of his toil. It is a curious law for the protection of labor which punishes the laborer for working. Yet

that is precisely what this law does. The laboring barber, engaged in a most respectable, useful, and cleanly pursuit, is singled out. . . . If he labors, he is a criminal. Such protection to labor carried a little further would send him from the jail to the poor-house.

There is no Sunday period of rest and no protection for over-worked employees of our daily papers. Do those not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law.⁷⁷

In the case of *Ex parte Koser*, which was a prosecution under the Sunday statute, the court held that there was no state religion and on this question the court said: We have no state religion. Consequently should not have any crimes against religion cognizable by the state.⁷⁸

VI. OPPOSITION TO SUNDAY LAWS

Not only have some courts declared Sunday laws unconstitutional but in some states, even where such laws have been upheld, the legislatures have begun action either to liberalize such laws or remove them from the statute books entirely. In some cases the question has been referred to the people. Invariably where the people are given the opportunity to vote on the question, the Sunday laws have been relegated to the limbo of bygone days. In Oregon the United States district judge ruled that the Oregon Sunday law prohibiting the operation of certain places of business on Sunday did not violate the constitution of Oregon,⁷⁹ which prescribes that "no law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."⁸⁰ The district judge ruled that this Sunday law did not interfere with the free exercise and enjoyment of religious opinions nor the rights of conscience; that it was purely a civil law and did not compel

⁷⁷ *Ex parte Jentzsch*, 112 Calif. 468 (1896).

⁷⁸ 60 Calif. 177 (1882).

⁷⁹ Article 1, Paragraph 3.

⁸⁰ *Brunswick-Balke-Colander Company v. Evans et al.*, 288 Fed. 991 (1916).

religious observance of Sunday. The court went to great length in its reasoning and its interpretation of the law, even stating that forbidding any secular business or labor on Sunday should be regarded as of civil instead of religious import.

The people of Oregon immediately set themselves to the task of repealing the Sunday law; by public referendum in the November election of 1916 they repudiated the verdict of the court by repealing the Sunday laws of Oregon by a large majority vote.

It might be natural to assume that Christians are in favor of Sunday legislation and that non-Christians oppose it; this, however, is by no means true. While it is a fact that such legislation is frequently sponsored by religio-political clergymen, certain organizations, and frequently ministerial associations, it is equally true that some of the staunchest Christians, clergymen as well as laymen, who have the interest of Christianity most at heart—Lutherans, Presbyterians, Episcopalians, Methodists, Seventh-Day Adventists, Roman Catholics—are definitely opposed to Sunday legislation. The Reverend Thomas J. Whelan, rector of the Holy Name Church in Camden, New Jersey,⁸¹ is opposed to Sunday laws and is working for their repeal in New Jersey. This Catholic priest states that he has traveled through the state of California, which has had no Sunday laws for more than fifty years, and finds that the lack of such laws does not make for decreased church attendance; on the contrary, church statistics show that in proportion to population more people attend church on Sunday in California than in any other state of the Union.

The Reverend Herman Bielenberg, a Lutheran pastor, in opposing the Pennsylvania Sunday laws and advocating their repeal, voiced not only his own opposition but that which the Lutheran church has frequently enunciated against this kind of legislation. He said:

In the first place, my appearance before the council was not on behalf of the operation of Sunday movies. I stated at the outset

⁸¹ *Courier Post*, April 11, 1933.

that I held no brief for theaters and movie houses. My appearance was meant solely to point out the dangers of religious legislation, which is class legislation, and to make clear the position of our church, which has its convictions, but has never tried to force anyone into believing as we do. It is, in my humble estimation, a deplorable situation when the churches of Christ who feel that they ought to keep Sunday, try to force everyone else to do the same thing, regardless of their conviction. It is thoroughly un-American. . . .

My plea is this: Let us respect each other's convictions. If you are so inclined, try to make your convictions my convictions by persuasion, but let us desist from forcing, coercing, legislating people into our position, if we feel that the gentle art of persuasion yields no results. As for me, I still want to be able to sing "Sweet Land of Liberty," liberty for myself, and even for those who do not happen to agree with me. When the church has to hide behind the skirts of officialdom, it is a sign that the younger is weak and sick.⁸²

The Reverend Bielenberg quoted at some length from the Augsburg Confession, which was drawn up during the Reformation and presented to the emperor at the Diet of Augsburg on June 25, 1530, and which is still the official confession of the Lutheran church, to show that the church does not believe that there is scriptural authority for Sunday observance. He continued:

That is my position and the official Lutheran position on the Sunday question. But even if we felt in duty bound to keep Sunday, we would consider it a grievous mistake to legislate this fact into the laws of the land. . . .

Let no one think that our church teaches lawlessness, or places no emphasis on the evil character of sin. We do not advocate the indulgence of the flesh. . . . We worship our God on Sunday, while opposing Sunday laws. Laws cannot make me worship, and laws cannot keep me from worshiping. I prize the old adage: "He governs best who governs least."

The Savior said: "If ye love Me, ye will keep My commandments." My aim has always been to bring a man to love Christ,

⁸² The Oil City (Pennsylvania) *News Herald*, January 5, 1933.

and he will naturally, freely, cheerfully, keep His commandments.⁸³

In speaking for the Baptists, the Reverend Arthur C. Baldwin, pastor of the Chestnut Street Church in Philadelphia, wrote the following letter to the editor of the *Philadelphia Public Ledger*, which was published on January 31, 1933:

Sir: As a churchman and lover of the real Christian Sunday, I am hoping that the present archaic Sunday laws in Pennsylvania will be changed by the legislature.

This is not because I want an open Sunday. I consider that to be a real peril. I do not believe that this nation can give up religion, its worship, quiet, and rest without a great irreparable loss. I urge a right observance of Sunday openly, and wish to use all the influence I possess to promote the observance of a quiet, helpful day.

The right sort of Sunday, however, can only come from the development of an inner spirit. We do not do well to rely on the state for that which only religion in the heart of man can produce.

Pastor Francis D. Nichol in a public hearing before the city council of Hyattsville, Maryland, presented the views of the Seventh-Day Adventists on the subject of Sunday laws:

I find myself in the very unusual position of being the only pastor in Hyattsville who is on the repeal side of the Sunday law question. At the same time, I am the pastor of the only church in this community whose membership, as a body, does not believe in attending movies on any day of the week. It is therefore evident, at the outset, that no desire for amusements and no possible connection with commercial interests can be attributed to me as a Seventh-Day Adventist minister in opposing Sunday laws. The petitions on the other side of the question, which have been read to the council, concern themselves simply with the "liberalizing" of the Sunday laws as regards movies. I am not interested in liberalizing the law. Believing that Sunday laws are wrong in principle, the only consistent position I can take is to petition for their repeal.

⁸³ *Ibid.*

I believe they are wrong because they violate the great principle enunciated both by Bible writers and by the founding fathers of this country—the principle of the separation of church and state. In the centuries before the United States government was established, church and state were, to a greater or less degree, united in every land. And all the hardships and persecutions to which religious minorities have been subjected through the centuries have resulted from such a union of church and state. When the religious majority in a state are able to register their beliefs on the statute books and can employ the arm of the law in support of their views, persecution, to a greater or less degree, inevitably follows. This is not a theory regarding government; it is a sad fact of history written in tears and blood in the annals of all religious minorities who thus suffered.

It was a new thing for the world to hear the founders of a nation declaring that the state has no right to legislate upon matters of religion and conscience. But just such declarations were vehemently made by Washington, Jefferson, Madison, and others. . . .

Sunday laws are a choice illustration of the religious legislation that formerly covered a wide field of conduct. In fact, in this country they are about the only definitely religious statutes that have come down to us. . . .

It is true that the spirit of the times holds back, to a great degree, the evil effects that would logically come from a consistent enforcement of Sunday laws. But as long as such laws exist they are a potential source of danger, and always provide a weapon for some intolerant individual. It is only a short time ago that a member of my denomination, living not many miles from here, was arrested for doing a little repair work in his house, painting some windows, on Sunday. He had kept "the seventh day" as God requires in the Sabbath commandment, and with clear conscience went to work on Sunday. But someone who believed differently took advantage of this Maryland Sunday law and had the man arrested. He spent five days in jail. His only crime was that he had violated a religious law.

I do not believe that such a law ought to be on the statute books. It can serve only as a religious law has ever served in the past, to provide a weapon for intolerance.⁸⁴

⁸⁴. The Hyattsville (Maryland) *Independent*, January 13, 1933.

The practice of keeping Sunday laws on the statute books, even when they appear antiquated and are not being enforced constitutes a potential danger. Such a case is called to our attention by the *Cleveland News* of September 20, 1933, in which an account is given of how a local committee for the enforcement of the N. R. A. code dug up an old Ohio Sunday blue law and endeavored to bring about its enforcement in connection with the N. R. A. movement. The Associated Press under date of September 22, 1933, carried a similar report. In commenting upon the situation, the *News* said:

Antiquated Ohio blue laws, that were thought to have been dead these many years, are being resurrected by Cleveland merchant associations to enforce the N. R. A.

The Buckeye Road board of trade was the first association to use the old laws as a weapon. The Fair Merchants of Central and Woodland and other groups were quick to follow.

Today the big question before the merchants of the city was how fast the movement may be expected to spread. And how many of the blue laws will be brought to life to restrict the city's Sunday trade.

Will it mean, they ask, that the full letter of the old blue laws will be enforced, making a Sabbath-breaker subject to a fine of \$100 and a sentence of six months in the workhouse?

How easy it is to be drawn into court under these laws was evidenced by the wording of a number of them. Under the provisions, baseball and other sports are prohibited in the forenoon, some of them all day Sunday. Nor has the husband the privilege to quarrel with his wife on the Sabbath, or carry firearms on a hunt, or ride horses, or take in a minstrel show or circus. Even drug stores would be forced to close up shop under the strict interpretation of the law.

Few people expect the laws to be enforced in full. Thus far, only those that compel merchants to accede to the demands of the N. R. A. have come into use.

Today in court two alleged violators were present. Louis Gordon, who operates a grocery at 13010 Buckeye Road, was haled into court by the Buckeye Road organization, because, it was al-

leged, he failed to close on Sunday with the other merchants who are trying to comply with N. R. A. . . .

The second violator to be brought in was Mrs. Anna Franklin, a grocer at 5118 Woodland Ave. She was haled into court by the Fair Merchants of the Central and Woodland Association.⁸⁵

It is evident that no one may ever be certain as to when or under what pretense religious laws may be resurrected. Not a few newspapers have carried vigorous editorials protesting against the use of the N. R. A. movement as a propaganda agency for Sunday laws or compulsory observance. In a number of communities local N. R. A. committees have linked Sunday closing crusades with the N. R. A. movement for national recovery. In an editorial of the *Sacramento Bee* of September 16, 1933, discussing the various attempts by certain people to secure the passage of Sunday laws and how the people have repeatedly shown that they are opposed to such legislation, it was said:

Yet under the guise of loyalty to the N. R. A., certain groups and classes are seeking to impose upon California what the people have declared shall not be done and which the courts have declared to be unjust and unconstitutional.⁸⁶

Religious laws having for their purpose the enforcement of religious dogmas may be resurrected and used in ways entirely foreign to American jurisprudence. To the question whether it would not be a good thing for public morals if church attendance on Sundays were made mandatory by law, Dr. S. Parkes Cadman has replied:

Decidedly not, nor could any self-respecting church have anything to do with so stupid an idea. I am not inclined to favor legal restrictions on the way in which the sacred day should be spent. St. Paul said, "Let no man take you to task in regard to eating or drinking or in the matter of a festival, a new moon or a sabbath, which are the shadow of things to come, but the substance belongs to Christ."

⁸⁵ *Cleveland News*, September 20, 1933.

⁸⁶ *Sacramento Bee* (California), September 16, 1933.

It is the office of the churches not only to regulate the behavior of their members but to protect their liberty as freemen of God and citizens of a democracy. Rather than fall back in humiliating compromise on the policeman's club we should use moral suasion to show that the more Sunday is unlike other days the better it will minister to human welfare. As you know, many of the prohibitions imposed by law concerning the holy day are no longer regarded seriously. Why crown our impotence by trying to add to their number? ⁸⁷

Contending that Sunday laws are unscriptural and unchristian, the great divine, Alexander Campbell, said:

There is not a precept in the New Testament to compel, by civil law, any man who is not a Christian to pay any regard to the Lord's day, more than to any other day.

Therefore to compel a man who is not a Christian to pay any regard to the Lord's day, more than any other day, is without the authority of the Christian religion.

The gospel commands no duty which can be performed without faith in the Son of God. "Whatsoever is not of faith is sin." But to compel men destitute of faith to observe any Christian institution, such as the Lord's day, is commanding a duty to be performed without faith in God.

Therefore to command unbelievers, or natural men, to observe in any sense the Lord's day, is anti-evangelical or contrary to the gospel. ⁸⁸

It is further contended by some that such legislation is contrary to the principles of Jesus Christ enunciated in Matthew 7:12: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets"; and in Matthew 22:21: "Then saith he unto them, Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." Likewise that it conflicts with the law of God as recorded in Exodus 20:8-11, which commands the observance of another

⁸⁷ In article syndicated by the New York *Tribune*, February 16, 1934.

⁸⁸ *Memoirs of Alexander Campbell*, edited by Robert Richardson (Philadelphia, 1868), 1:528.

day: "Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work; but the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work."

These people point to the example of Jesus Christ Himself to show that Christianity, the religion of Christ, is a religion of love and not of law. Christ did not teach by force. His work was one of persuasion. Christ aimed at the heart of man, at the "new birth," at "regeneration." In spite of the fact that He lived during what may probably be regarded as the most critical period of the world's history, He took no part in any political movement. He might well have headed some popular party and have competed with kings and statesmen. He was no agitator, even though He lived in an age abounding in abuses. "The cry of the poor against the oppressor was never louder than in His lifetime; slavery was universal; no country on earth enjoyed a free government." Yet he abstained from meddling with state affairs. His meat, He said, was "to do the will of Him that sent me."

He came to found a kingdom, and that kingdom was to exist on earth, and was to be the ideal condition of mankind; but He trusted to move and mould society by regenerating the individual and by teaching men to seek in the first place not what "the Gentiles seek" — happy outward conditions — but the kingdom of God, the rule of God's Spirit in the heart, and the righteousness that comes of that. It was by the regeneration of individuals society was to be regenerated. The leaven which contact with Him imparted to the individual would touch and purify the whole social fabric.⁸⁹

Many feel that the influence of the church itself is greatly weakened when it appeals to civil authorities for aid; they say:

The church is respected by men as a guide, but not as a policeman, regulating their manners. It destroys its own influence when it goes to legislatures for laws whereby to force upon men its

⁸⁹ *An Exposition of the Bible* (Hartford, 1903), Vol. 5.

ideas of morality; it does not honor itself when it calls for the assistance of policemen.⁹⁰

The motives back of Sunday laws, as well as their real objectives, are clearly stated by the Reverend S. V. Leach:

Give us good Sunday laws, well enforced by men in local authority, and our churches will be full of worshipers, and our young men and women will be attracted to the divine service. A mighty combination of the churches of the United States could win from Congress, the state legislatures, and municipal councils, all legislation essential to this splendid result.⁹¹

Christopher G. Tiedeman, in his *Limitations of the Police Power*, says concerning the "secular view" of such laws:

That the enactment and enforcement of Sunday laws have no other origin and inspiration than the "spirit of New England," which in colonial days "imposed a fine for absence from public worship"; that every such law does, in fact, exist and exist only "because of the religious character of the day"; and that no such law ever has existed or ever will exist "for any economical reason."⁹²

The Kentucky Court of Appeals said of a Sunday statute that the

intent was to compel observance of the Sabbath day by all persons, without reference to the trade, business, or occupation.⁹³

Judge Edwin O. Lewis of the Quarter Session Court of Philadelphia on November 2, 1932, denounced the Sunday blue laws of Pennsylvania as "ridiculous," "unenforceable," and as "breeding contempt" for all laws.

Judge Furman of Oklahoma in speaking of Sunday laws in general said:

They should either be amended or repealed. We do not like to speak disrespectfully of any legislative act, but our present laws upon the subject of Sabbath breaking are a miserable farce.⁹⁴

⁹⁰ Cincinnati Post, August 12, 1929.

⁹¹ S. V. Leach, D. D., in *Homiletic Review* for November, 1892.

⁹² Pages 175, 176 (St. Louis, 1886).

⁹³ Gray v. Commonwealth, 171 Ky. 269 (1916).

⁹⁴ Todd Cheeves v. State, 5 Okla. Crim. Rep. 361 (1911).

These are but a few instances of public sentiment in favor of religious liberty as opposed to Sunday legislation. The Wisconsin state legislature recently repealed every Sunday law upon its statute books. The repeal statute was signed by Governor Schmedeman just a year after the people of Wisconsin had, by a majority vote of 124,650 in a popular referendum election, given a mandate to the state legislature to repeal the existing Sunday laws. The Wisconsin Sunday laws had been very drastic, although only partially enforced and only in localities where religious sentiment dominated public officials. All religions and all citizens of the state of Wisconsin now stand on an equality before the civil bar of justice. The state no longer attempts to interfere with the free exercise of conscience in religious matters, refusing to give legal support to any mode or form of worship.

Five states, namely, California, Oregon, Arizona, Wyoming, and Wisconsin, have now repealed their Sunday laws. In California, in which Sunday laws were repealed fifty years ago, steps have occasionally been taken by a group of political clergymen to have them re-enacted, but every such effort has been defeated either by the legislature or by popular referendum. The last attempt to have the Sunday laws placed back upon the statute books was made in 1930. A referendum defeated the effort by more than 75,000 votes.

As we have seen, the Oregon Sunday laws were repealed by a popular referendum vote. The Supreme Court of Arizona declared the Sunday laws of that state unconstitutional. Wyoming repealed her Sunday laws in 1932 by an act of the legislature. The Wisconsin referendum and the action of the state legislature in repealing the Sunday laws of that state are referred to above. With the exception of Arkansas, Delaware, Mississippi, South Carolina, and Virginia, all the states in the Union authorize municipalities and political divisions to modify, liberalize, or repeal a part or a whole of the Sunday laws by legislative action or popular referendum. Such

action has resulted in liberalizing or repealing the Sunday laws in many of these communities. At present organized efforts are on foot in Maine, Maryland, Minnesota, Tennessee, New Jersey, Pennsylvania, and there are strong sentiments in many other states, either for liberalizing or repealing the Sunday laws.

VII. ONE DAY OF REST IN SEVEN

Where there is actually a desire to provide for one day of rest under the police power of the state without injecting the religious element into it, many people are advocating a law requiring "one day of rest in seven." The legislature of New Hampshire has just passed such a law in lieu of her old Sunday law. Any person may work on Sunday provided he rests twenty-four consecutive hours during the six days next ensuing. This law aims to protect employees from seven days of work a week. California has a similar law.

The American Federation of Labor has several times gone on record as favoring a one day of rest in seven law for all employees without specifying any particular day of rest, leaving each employee to select his own day and the manner of its observance. Miss Frances Perkins, secretary of labor in President Roosevelt's cabinet, said in her first public announcement after she was inducted into office: "While it is foolish for one person to present a program of employment relief, one constructive measure would be for all states to adopt the one day of rest in seven law. This would put many thousands back to work." Such legislation would constitute civil legislation and make for religious liberty. It would leave the religious element out of the question, and this is perhaps the logical way to dispose of the Sunday law question.

Among the most sacred heritages of man is his right of conscience. Whatever work the state may undertake for the moral benefit of her subjects, the person's conscience should be respected. The claim put forth upon certain occasions

that the design of Sunday laws is to secure liberty and health for the laboring classes does not reach the core of the question. The many cases on this subject state with unmistakable clearness that the ultimate and sole object in the minds of the Sunday law originators was to promote the interest and influence of the church by constraining men to attend to her ordinances. In this day of enlightenment we ought not to be forced to continue work begun in the past. We live in a time when men ought to have, by reason of experience and the principles laid down by our forefathers, a better understanding and conception of truth and religious freedom. Sunday legislation is contrary not only to the principles of American law but to the principles and precepts of Christianity itself.

CHAPTER XVII

CONCLUSION

PRIOR TO the Federal Convention in 1787 each of the colonies had established a government of its own, based upon Anglo-Saxon political traditions, which guaranteed its citizens the inalienable rights of life, liberty, and the pursuit of happiness. In addition, the thirteen colonies had united themselves under the Articles of Confederation into what they termed a "perpetual union," to be known as the "United States of America."

The first enactment of national importance guaranteeing religious freedom was included in the Ordinance of 1787, passed by the Congress under the Articles of Confederation. This ordinance effecting the organization of the Northwest Territory also provided that "no person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory." This ordinance has been regarded by many as second in importance only to the constitution of the United States.

In the National Convention the experience of the colonies, the new state constitutions, the Articles of Confederation, and the teachings of European writers like Montesquieu and Locke were the precedents and materials out of which our federal constitution took form. The substance of the constitution was, therefore, not the schemes of unscrupulous and selfish men but the embodiment of a nation's political philosophy—a philosophy developed after an adequate period of sustained consideration of the problems relating to church, people, and state and after observation of what had happened to human rights and human responses under the

widely varying situations that had existed under colonial governments.

Thus our constitution is the living gospel of the liberties of the people. It is not a compilation of restrictions and restraints upon them, but the guarantee of those essential liberties without which no man's home or living, peace or livelihood, happiness or freedom, would be safe from ambitious rulers, envious neighbors, or a grasping state. A close compact of church and state had been regarded by other governments as the chief support of public morality, order, peace, and prosperity; but, as the first example in history, the United States has stood forth as a government deliberately depriving itself of all legislative control over religion and refusing to sectarianize any jurisdiction in state prerogatives—an untrammelled independence in both the spiritual and civil realm.

The constitution found the nation and its religion and institutions already in existence, and was not designed to create any of them. It was a frame of government organized to protect human rights under a republican form of government in a rule of the people, by the people, and for the people. The nation's leaders felt that any interference with religion by the government would be an impious encroachment upon the prerogative of God, that every religion should maintain itself by the excellence of its own doctrines, and that any pretense of alliance between church and state would be dangerous to the safety of the new government. For these reasons a government was formed which provided for the complete separation of church and state.

With very little debate the provision was adopted that no religious test should ever be required as a qualification to any office of public trust.¹ The elimination of a religious test as a qualification for public office implied the right of worship according to the dictates of one's own conscience, but the constitution was otherwise silent on the question of re-

¹ Constitution of the United States, Article 6.

ligious liberty. Some of the staunch friends of religious liberty were not satisfied with a negative declaration. They demanded a positive pronouncement upon the religious liberties guaranteed by the constitution, thus assuring the separation of church and state. Some of the states refused to ratify the constitution until they were assured that ample provision should be made in the form of a "Bill of Rights" safeguarding these rights.²

Five of the states, while adopting the constitution, proposed amendments. New Hampshire, Virginia, and New York proposed, among other changes, a declaration of religious freedom. North Carolina at first declined to ratify the constitution until she was given assurance that an amendment guaranteeing religious liberty would be added. Accordingly, at the first session of the first Congress, twelve amendments to the constitution were proposed by James Madison, ten of which were adopted. The first was among those adopted; it provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press."³ In regard to this amendment and the purpose of it, the United States Supreme Court has said:

The first amendment to the constitution . . . was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.⁴

² When Thomas Jefferson saw a draft of the constitution proposed for adoption he expressed in a letter to a friend his disappointment that there was no express declaration establishing freedom of religion. He was willing to accept it, trusting, as he said, "that the good sense and honest intentions of our citizens" would bring about the necessary alterations. *Writings of Thomas Jefferson*, edited by H. A. Washington (Philadelphia, 1871), 1:79; 2:355.

³ Constitution of the United States, first amendment.

⁴ *Davis v. Beason*, 133 U. S. 333 (1890).

This first amendment accorded with the views of the advocates of religious freedom as expressed in the words of Jefferson, who said:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declares that their legislature should “make no law respecting an establishment of religion or prohibiting the free exercise thereof,” thus building a wall of separation between church and state.⁵

Bryce, in his *American Commonwealth*,⁶ in speaking of the reverence for the constitution said that it “is itself one of the most wholesome and hopeful elements in the character of the American people.”

Article 6 states that “this constitution, and the laws of the United States which shall be made in the pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” Thus was declared the supremacy of the constitution, its treaties and laws.

The first amendment insures not merely toleration but religious equality and liberty as a political right. Some persons have contended that this amendment prevents the states from passing legislation affecting religion. But it means only what it says. It stipulates that “Congress shall make no law” and thus is not a restriction on the action of the state legislatures.⁷

⁵ Reynolds v. United States, 98 U. S. 145 (1878).

⁶ Second ed. (London and New York, 1889), 1:29.

⁷ The restrictions bearing upon religious legislation and the guarantees of religious liberty so far as the state legislatures are concerned are to be found in the state constitutions. Spies v. Illinois, 123 U. S. 131; in re Kimmeler, 136 U. S. 436 (1890); Reynolds v. United States, 98 U. S. 145 (1878).

In the case of *Permodi v. Municipality*⁸ the court made the following statement:

The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the constitution of the United States in this respect on the states.

The Supreme Court of the United States has held that the first ten amendments to the federal constitution were not intended to limit the powers of the state governments in respect to their own people but to operate on the national government alone.⁹ The fourteenth amendment is the first to interfere between the state and the individual. By this amendment the people of the United States made the supreme law of the land to declare explicitly that

No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court observed that "the word religion is not defined in the constitution";¹⁰ however, it may be defined in the words of the Virginia declaration of rights, adopted on January 12, 1776, which reads:

The duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience.¹¹

Thomas Jefferson defines the term "religion" as used in the early documents to comprehend all believers or unbelievers of the Bible. Religion is the alpha and omega of our moral law.¹²

⁸ 3 Howard (U. S.) 588 (1845).

⁹ *Spies v. Illinois*, 123 U. S. 131 (1887).

¹⁰ *Reynolds v. United States*, 98 U. S. 145 (1878).

¹¹ Section 16.

¹² *Jefferson's Works*, 1:545.

Schaff, in his *Church and State in the United States*,¹³ points out an important distinction between "liberty of religion" and "toleration," when he says that "toleration is a concession, which may be withdrawn . . . In our country we ask no toleration for religion and its free exercise, but we claim it as an inalienable right."

Judge Cooley declared that the American constitutions have not merely established religious toleration but religious equality.¹⁴

The United States Supreme Court said:

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.¹⁵

Absolute religious freedom is by our constitution and judicial interpretations guaranteed, "unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated."¹⁶

Thus it is that in this country the individual has the full right to entertain any religious belief that he may choose, or to practice any religious principle, and to teach any doctrine, so long as he does not violate the laws of property or infringe upon the personal rights conceded to all. Such a law knows neither heresy nor orthodoxy. It is not committed to the opinion of any dogma nor to the establishment of any sect. Our law does not depend upon the leniency of government or upon the liberality of any class of people, but upon the natural, indefeasible rights of conscience of the individ-

¹³ Page 14.

¹⁴ Cooley's *Constitutional Limitations*, 5th ed., Chapter 13.

¹⁵ *Watson v. Jones*, 13 Wall. 679 (1871).

¹⁶ *In re Opinion of the Justices*, 214 Mass. 599; 102 N.E. 464 (1913).

ual, which are beyond the control or interference of any secular authority or institution. It is not a principle of toleration but of religious liberty, in which all religions are placed on an absolute equality before the law. In the words of Governor Pollard:

This was America's greatest and most distinctive gift to the science of government. Acts of toleration had before been passed, but never before had any government put all religions on a footing of perfect equality.

To the minds of some, religious liberty means liberty to Christian denominations only, and to other religions simply toleration; but the word "toleration" has no place in our political vocabulary, for it carries the implication that we, by our grace, may extend to others the privilege of worshipping God as they may please, while as a matter of fact men do not worship God according to the dictates of conscience by virtue of any man-given right. The gift is direct from God. It is born with us.¹⁷

The general trend of court decisions and legislative enactments as compiled and analyzed in the preceding chapters points definitely to the conclusion that if the American government is to provide the greatest benefits and privileges that a state can offer to its citizens it must ever maintain a complete separation of church and state. It appears that the American people have largely outgrown the doctrines of religious tests and of taxation for religious purposes, the trend of public thought on the part of the majority having been toward a complete emancipation, respectively, of civil and spiritual agencies.

Simultaneously, especially in the past quarter century, there appears to have been an attempt on the part of organized religious groups to appeal to the state for the teaching, preference, and enforcement of their dogmas. Such efforts on the part of ecclesiastical bodies to secure the support of

¹⁷ Speech of Governor Pollard of Virginia delivered at the National Celebration Commemorative of the Religious Character of George Washington and the Separation of Church and State, held in Fredericksburg, Virginia, on October 16, 1932. *Liberty*, Vol. 28, No. 1, 1933, p. 3.

the strong arm of the state may be an unconscious confession of the weaknesses grown into or inherent in organized religion. However, it is by no means certain that a religion organized for spiritual purposes, if it is not diverted from its mission, must have weaknesses simply because of organization; but it is certain that any religion, organized or not, that solicits state aid or seeks a hand in state affairs either is weakened or is inviting the decline of its spiritual powers.

In this connection there has been a definite attempt to bolster religion by requiring Bible reading in the public schools. The incidental controversy and its significance is the chief concern of this book. Along with this attempt to "place the Bible in the public schools" there has been developing, in the minds of many, a liberalizing thought, a greater objection to such intrusion on the grounds that it means bringing religion into the public schools.

The record of court decisions tends to indicate progress toward greater security of freedom of religious conscience. The federal constitution and all state constitutions prohibit any law respecting an establishment of religion. They prohibit compulsory support of religion through taxation or otherwise, restraints upon expressions of religious belief or the free exercise of religion according to the dictates of conscience, and compulsory attendance at worship.

A public school in which no religion is taught invades the religious rights of no one. By leaving the matter of religion entirely alone, such a school justifies its existence and support by general taxation on grounds which have no relation to religion and which provide a commonage for unity among all people regardless of religious beliefs. Religious instruction in the public schools is, so far as the taxpayer is concerned, an enforced support of religion; and the courts have shown a tendency to recognize this principle and to keep the schools free of doubtful practices. At first only material definitely sectarian or denominational was interpreted as being unconstitutional; there is now a definite trend on the part of the

courts to eliminate entirely all instruction that might be construed as denominational. Where the laws of the state are silent on the subject of Bible reading, the practice is at the discretion of school officials, the courts being left to act where abuse is clearly shown.

Because the American states consider that religious doctrine has no legal status, because they guarantee and promote the same citizenship for all classes without respect to race or creed, it seems reasonable that we should eliminate discriminatory religious material from state-supported schools. The Christian holds no civil right that the professors of another creed or of no creed do not also hold. The Mohammedan has recourse to the same remedies, civil and criminal, for wrongs inflicted as are available to a Christian, a Jew, or any other person. He may vote and he may hold public office. He may not only administer the law but he may help make it.

Litigation, court decisions covering many phases of the question, and in general all the controversy that has taken place, prove that religious instruction in the public schools cannot be separated from denominational differences. Any form of sectarianism results in religious discriminations, from which our schools should be zealously protected. Any alliance or bond joining the church and the state in their separate functions, in their separate and distinct spheres of operation, is not only injurious to both but forbodes evil to all concerned. A complete separation of church and state places Catholics, all Protestant denominations, and any other denomination or religion on an equal footing. Every church must grant to others its own rights and privileges and no more, namely, a free and untrammelled opportunity to hold to its tenets and to proclaim them without state support or prejudice, so long as they are not destructive of the rights of others.

The state, that is, the people acting in their organic capacity through the machinery of law, says to all religious

sects, to all anti-religionists, and to all classes of citizens that its position with respect to the public schools is one of absolute and impartial "neutrality" toward all religious doctrines, whether they be drawn from the Bible or another source. The state likewise declares that the public school is not designed to include religious doctrines either as a means or an end; for the state considers Protestants, Catholics, Jews, rationalists, infidels—indeed, every man, woman, and child subject to its jurisdiction—simply on a basis of citizenship, without discrimination on religious grounds. The public school is a piece of state machinery organized and supported for purely secular ends. Its function is not to make nor unmake Christians, nor to educate children in this or that form of religious faith. Its function is to prepare for citizenship. It eschews religious education. Its work is carried on from the point of view of utility to the state. In short, its purpose is secular education with no meddling in the province of the church.

This, the evidence clearly shows, is the basis on which a school system organized and conducted by an American state should rest. It is the proper attitude of the state with reference toward the Catholic, and just as proper to the Protestant, the Jew, or the atheist. It is the one that has been reiterated again and again by the courts. The public schools should have no religious creed to teach or enforce but should leave the teaching of religion to the home, the church, and the church school. It is only as such a position is taken that the principles and ideals upon which our government is founded, namely, the complete separation of church and state, may be maintained.

In the words of the Reverend Samuel T. Spear, a Presbyterian minister:

The public school, like the state, under whose authority it exists, and by whose taxing power it is supported, should be simply a civil institution, absolutely secular and not at all religious in its

purpose, and all practical questions involving this principle should be settled in accordance therewith.¹⁸

The pervading constitutional principle of the various states is that the state as such has nothing to do with religion beyond affording to the people protection in the enjoyment of their religious rights and consciences. The principle enjoins upon the state the duty to afford to every citizen, so far as religion is concerned, impartial protection, but to stop there. This gives religious truth and its friends a fair and open field without patronage and without hindrance. While it is true that some courts have upheld the constitutionality of laws permitting or requiring Bible reading in the public schools, it is still true that the mature judgment of American legislatures and courts opposes, in the matter of public school organization and practice, any intrusion of religion or sectarian influences in the public schools.

The definitive catalogue and analysis of the constitutions of American commonwealths, statutes, and court decisions as contained in this book proves the soundness of the propositions declared by Professor Paul H. Hanus:

(1) Formal or explicit instruction in religion in the public schools is undesirable, unnecessary, and, in most cases, legally impossible; and

(2) Religious education, including detailed instruction in the Bible, is the duty of the church.

These propositions are not new; but in the contemporary transitional state of religious belief, and in view of the strong, increasing, and justifiable demand for instruction in the Bible, we need to remind ourselves often of their validity; lest, in spite of the lessons of history and of contemporary experience, we entertain unwise or even disastrous suggestions; and, failing to aid the contemporary promising, though as yet only incipient efforts of the church, we invite dissension and disaster, and so defeat our own ends.¹⁹

¹⁸ Samuel T. Spear, *Religion and the State* (New York, 1876), p. 384.

¹⁹ Paul H. Hanus, *Beginnings in Industrial Education and Other Educational Discussions* (New York, 1908), p. 166.

The proper sphere of our government was well stated by the United States Senate when it said:

It is not in the legitimate province of the legislature to determine what religion is true or what false. Our government is a civil and not a religious institution. Our constitution recognizes in every person the right to choose his own religion, and to enjoy it freely without molestation. . . . The proper object of government is to protect all persons in the enjoyment of their civil as well as their religious rights, and not to determine for any whether they shall esteem one day above another, or esteem all days alike holy. . . . What other nations call religious toleration, we call religious rights. They are not exercised in virtue of governmental indulgence, but as rights of which government cannot deprive any portion of its citizens, however small. Despotism may invade those rights, but justice still confirms them.²⁰

Occasionally we have failed to attain the high ideal which our constitution places before us in granting to every American citizen fullest protection in his religious belief; but such civic inertia has been no fault of the constitution and has been in violation of its spirit. Infringements have appeared from time to time throughout our history when individuals or organizations have endeavored, frequently under the guise of patriotism, to fan the sparks of religious prejudices. Instances may be found where individuals have been excluded from public office, from citizenship, from employment, or from attendance in colleges and universities as a result of discrimination based on religious differences or conscientious scruples. Such have been the exceptions rather than the general rule.

For religious liberty is like the air we breathe, breathed and unthought of by many until some hostile element asserts itself. Civil and religious freedom is one of the greatest privileges we enjoy in this proud republic of ours. Many are the sacrifices that have been made through dark centuries in the long and terrible struggle for liberty.

²⁰ United States Sunday Mail Report, 20th Congress, 2d Session, January 19, 1829.

A careful examination of the federal and state constitutions discloses that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty and to guard against the slightest approach toward the infringement of such rights. Nor did they fail to perceive that a union of church and state like that which existed in other countries was, if not wholly impractical in America, certainly opposed to the spirit of this country.

In some respects this struggle for religious freedom carried on during and following the Revolutionary War may be said to have been even more important and more far-reaching in its results than was the war itself; for to the principles of religious liberty here established, more than to its national independence and its stand for civil liberty, may undoubtedly be traced much of the real greatness and influence of this nation in the world. A new nation with the old religious despotism still clinging to it would have been no great addition to the world's assets; but a nation founded upon the true principles of both civil and religious liberty was indeed a noteworthy achievement.

APPENDIX

APPENDIX

PRINCIPAL CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT DECISIONS AFFECTING BIBLE READING IN THE PUBLIC SCHOOLS OF THE SEVERAL STATES

In some states there is no statute bearing upon the subject of Bible reading. In other states the statutes require, permit, or prohibit such reading, and in some of them the courts have interpreted such statutes. For the sake of brevity only portions of the statute or statutes or of court decisions involved are quoted.

ALABAMA

The state of Alabama requires all schools supported in whole or in part by public funds to have once every school day, "readings from the Holy Bible."¹

The statute further provides that the teachers in making their monthly reports must show that the act has been complied with. A failure to comply with the provision forfeits the school's right to draw upon the public funds of the state.²

All the schools of the state have Bible reading.³

ARIZONA

The constitution of Arizona provides that no sectarian instruction shall be imparted in any school or state educational institution, and that

no religious or political test or qualification shall ever be required as a condition of admission into any public educational institution of the state, as teacher, student, or pupil; but the liberty of conscience hereby secured shall not be so construed as to justify practices or conduct inconsistent with the good order, peace, morality, or safety of the state, or with the rights of others.⁴

"Any teacher who shall use any sectarian or denominational book, or teach any sectarian doctrine, or conduct any religious ex-

¹ Alabama Laws, 1919, Act No. 459, Section 1.

² *Ibid.*, Sections 2 and 3.

³ The number of schools having Bible reading is given as reported by the state department of education in each state.

⁴ Constitution of Arizona, Article 11, Section 7.

ercises in his school," shall be guilty of unprofessional conduct and have his certificate revoked.⁵

None of the schools of the state have Bible reading.

ARKANSAS

No teacher employed in any common school shall permit sectarian books to be used as a reading- or textbook in the schools under his care.⁶

This statute is similar to the Arizona law. No case having come up, it has not been determined whether or not it would be interpreted as barring the Bible from the public schools. There was, however, an initiated act approved by the voters of the state in the general election of 1930 which now requires the Bible to be read without comment daily in the public schools of the state.⁷

The State Department of Education estimates that 95 per cent of the schools have Bible reading.

CALIFORNIA

The constitution of California prohibits the teaching of any sectarian or denominational doctrine either directly or indirectly in any of the common schools of the state.⁸ By statute this state specifies:

No publication of a sectarian, partisan, or denominational character must be used or distributed in any school, or be made a part of any school library; nor must any sectarian or denominational doctrine be taught therein.⁹

Any violation of this provision deprives the school of its right to draw on public funds.

Evans brought an action to enjoin the trustees of the Selma Union High School from carrying into effect a resolution for the purchase of twelve Bibles in the King James version for the library of the high school.¹⁰ The Supreme Court of California held that the King James version of the Bible is not a sectarian book and that its purchase for the library would not be a violation of the constitutional or statutory provisions requiring the exclusion

⁵ Revised Code of Arizona, 1928, Section 1044.

⁶ Digest of the Statutes of Arkansas, 1921, Section 9028.

⁷ See "The Legal Status of Bible-Reading in the Public Schools," *School Review*, 39:4-6 (January, 1931).

⁸ Constitution of California, Article 9, Section 8.

⁹ Statutes and Amendments to the Codes of California, 1931, Section 1672.

¹⁰ *Evans v. Selma High School District of Fresno County*, 222 Pac. 801; 31 A. L. R. 1121 (1924).

of sectarian, partisan, and denominational publications from schools and school libraries. The court by unanimous decision took the position that the fact that there are differences between the King James version and other versions, that it is of Protestant authorship and is used in Protestant churches, and that it is not approved by the Roman Catholic church, does not make the mere act of purchasing it an adoption of the dogma therein.

In another case the school board of the Fruitridge School District required dancing as a part of the curriculum.¹¹ The pupils were expelled for refusing to dance. The dancing was required as part of the instruction in physical education, some of the dances being "Ace of Diamonds," "Minuet," "Norwegian March," and "Children's Polka." Girls had boys for partners and were taught to waltz and foxtrot. The court granted the parents of the expelled children a writ of mandamus requiring the school board to reinstate the children on the ground that such exercises were offensive to the conscientious scruples of the children and parents, the protection of which was guaranteed them by the constitution of California.¹²

None of the schools have Bible reading.

COLORADO

The constitutional provisions of Colorado relative to Bible reading are as follows:

No person shall be required to attend or support any ministry or place of worship, religious sect, or denomination against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.¹³

No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools.¹⁴

In 1927 Charles Vollmar, a Catholic school patron, brought a mandamus action against Stanley, president of the Board of Education of School District 118, Weld County. The board required as a part of the morning exercises in each classroom the reading by the teacher of a portion of the King James version of the Bible

¹¹ *Hardwick v. Fruitridge School District*, 205 Pac. 49 (1921).

¹² *Constitution of California*, Article 1, Section 4.

¹³ *Constitution of Colorado*, Article 2, Section 4.

¹⁴ *Ibid.*, Article 9, Section 8.

without comment. Vollmar's children were not permitted to leave the room during the reading.

The question was whether this action by the school board was contrary to the fourteenth amendment of the United States constitution, which stipulates: "Nor shall any state deprive any person of life, liberty, or property, without due process of law," to the religious liberty clause of the Colorado constitution,¹⁵ or to Article 9, Section 7, which forbids payments from public funds "in aid of any church, or sectarian society, or for any sectarian purpose." The Supreme Court of Colorado held that reading of the Bible without comment was permissible in the public schools but that attendance of children must be optional; that the King James version is not sectarian. The court pointed out that if parents can have their children taught what they please, they can refuse to have them taught what they think harmful—barring what must be taught, such as the essentials of good citizenship. What these are, the Board of Education of each district, primarily, and the courts ultimately must decide.

It is estimated that 50 per cent of the schools have Bible reading.

CONNECTICUT

Connecticut has the following constitutional provisions:

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state.¹⁶

No preference shall be given by law to any Christian sect or mode of worship.¹⁷

The fund called the School Fund shall remain a perpetual fund.¹⁸

There are no court decisions in this state pertaining to Bible reading.

According to the State Department of Education, 50 per cent of the schools have Bible reading.

DELAWARE

The constitution of Delaware stipulates concerning Bible reading in the schools:

¹⁵ Constitution of Colorado, Article 2, Section 4.

¹⁶ Constitution of Connecticut, Article 1, Section 3.

¹⁷ *Ibid.*, Article 1, Section 4.

¹⁸ *Ibid.*, Article 8, Section 2.

No religious services or exercises except the reading of the Bible and the repeating of the Lord's Prayer shall be held in any school receiving any portion of the money appropriated for the support of public schools.¹⁹

In each public school curriculum in the state, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening of such school, upon each and every day, by the teacher in charge thereof . . .²⁰

All the schools have Bible reading.

DISTRICT OF COLUMBIA

Bible reading in the District of Columbia is controlled by the federal constitution and amendments, which read in part:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.²¹

No religious test shall ever be required as a qualification to any office or public trust under the United States.²²

The Board of Education of the District requires that

Each teacher shall, as a part of the opening exercises, read, without note or comment, a portion of the Bible, repeat the Lord's Prayer, and conduct appropriate singing by the pupils.²³

The Bible is read in all the schools.

FLORIDA

The constitution of Florida declares:

That all schools in this state that are supported in whole or in part by public funds, be and the same are, hereby required to have once every school day reading in the presence of the pupils from the Holy Bible, without sectarian note or comment.²⁴

The teachers in making their monthly reports are required to show that they have complied with the above act, and the county superintendent must make certain that the reading has been complied with before he can draw warrants on the public funds. No provision is made for children to be excused during the reading of the Bible.

All the schools have Bible reading.

¹⁹ Delaware Laws, 1923, Chapter 182, Section 1.

²⁰ *Ibid.*, Section 2.

²¹ Constitution of the United States, first amendment.

²² *Ibid.*, Article 6.

²³ By-Laws and Laws of the District of Columbia Board of Education, 1926, Chapter 6, Section 4.

²⁴ Compiled General Laws of Florida, 1927, Section 621.

GEORGIA

The Georgia statute provides that the Bible, including both the Old and the New Testament, shall be read in all the schools receiving aid from the state funds, and that not less than one chapter shall be read at some appropriate time during each school day. The statute provides that upon the proper request by parents or guardians children may be excused while the said reading takes place.²⁵

The Georgia Textbook Commission has authority to adopt a uniform series of textbooks for use in the high schools; "none of said books so adopted shall contain anything of a partisan or sectarian nature."²⁶

The city commission of Rome, Georgia, passed an ordinance requiring some portion of either the Old or the New Testament of the King James version to be read without comment, and prayer to be offered to God in the hearing of the pupils daily during the regular session of the school. Reading and prayer were to be conducted by the principals or persons asked by them to take the services. Upon written request from parents or guardians to the superintendent of schools pupils might be exempt from attendance upon the ground of conscientious objections. A mandamus was sought to require the Board of Education of Rome to enforce the above city ordinance.

The court held that the ordinance requiring the reading of the Bible and prayer is not in conflict with the constitution of Georgia and that it was not a violation of freedom of conscience, nor was it sectarian use of public funds.²⁷

All the schools have Bible reading.

IDAHO

In Idaho selections from the standard American version of the Bible are to be read daily in all public schools from a selected list of passages furnished from time to time by the State Board of Education,²⁸ the statutory provision of the state being that "teachers employed in all such schools shall, at the opening of each morning's session, . . . read, without comment or interpretation,

²⁵ Georgia Political Code, 1926, Section 1551.

²⁶ Georgia General Laws, 1931, No. 296, Section 2.

²⁷ *Wilkerson v. City of Rome*, 152 Ga. 762; 20 A. L. R. 1334 (1921).

²⁸ Idaho Laws, 1925, Chapter 35, Section 1.

from twelve to twenty verses from the standard American version of the Bible."²⁹

The teacher may not make any comments upon the passages of Scripture read, and if a pupil raises a question calling for comment or explanation, the teacher must without comment refer the inquirer to his parents or guardians for reply.³⁰ The statute permits excusing pupils during such Bible reading.

The Bible is read in all the schools.

ILLINOIS

The Illinois constitution declares:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed . . . No person shall be required to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious denomination or mode of worship.³¹

Neither the general assembly nor any county, city, town, township, school district . . . shall ever make any appropriation . . . anything in aid of any church or sectarian purpose, or assist any school.³²

Certain taxpayers, members of the Roman Catholic church, of School District No. 24 brought action against the board of directors for requiring children to listen to the reading of the King James version of the Bible.³³ No comments were made upon the reading, but pupils were required to stand and assume a devotional attitude and to be questioned on Bible passages. The Supreme Court of Illinois held such practices to be unconstitutional. It pointed out that the Illinois constitution guarantees the "free exercise and enjoyment of religious profession and worship, without discrimination," and that it further prohibits "any appropriation or pay from any public fund whatever in aid of any church or sectarian purpose," that the above exercises constitute worship, that the individual does not enjoy "free exercise of religious worship who is compelled to join in any form of religious worship."

The wrong arises, not out of the particular version of the Bible or form of prayer used, whether that found in the Douay or the King James version, or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship.

The court stated that the provision in the Ordinance of 1787

²⁹ *Ibid.*, Section 2.

³⁰ *Ibid.*, Section 3.

³¹ Constitution of Illinois, Article 2, Section 3.

³² *Ibid.*, Article 8, Section 3.

³³ *The People v. Board of Education*, 245 Ill. 334 (1910).

declaring that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged," is no longer in force, having been superseded by the adoption of her constitution and the admission of Illinois into the Union.

None of the schools of the state have Bible reading.

INDIANA

An Indiana statute provides that "the Bible shall not be excluded from the public schools of the state."³⁴

By an act of 1925 any university, normal school, teachers college, or other institution of higher learning of the state may permit students enrolled in such institutions to elect, as part of the work required for graduation in such state school, biblical and religious instruction conducted and maintained by some association, college, seminary, or school organized for religious instruction, the only stipulations being that the educational qualifications of teachers giving such credit and recitation, content of instruction, and attendance requirements be the same as in the state schools.³⁵

The State Department of Education estimates that the Bible is read in 50 per cent of the schools.

IOWA

The Iowa statute states that the Bible shall not be excluded from any public school or institution in the state, but adds: "nor shall any child be required to read it contrary to the wish of his parent or guardian."³⁶

The case of *Moore v. Monroe*³⁷ involved a school in which the teachers were accustomed to occupy a few minutes every morning in reading selections from the Bible, in repeating the Lord's Prayer, and in singing religious songs. The plaintiff, a taxpayer, had two children in school. Though his children had not been required to be present during the time devoted to religious services, he objected to such exercises on the ground that the statute was a violation of the religious liberty clause of the constitution,

³⁴ Indiana Statutes (Burns'), Section 7069 (Acts of 1865).

³⁵ *Ibid.*, Section 7282 (Acts of 1925).

³⁶ Code of Iowa, 1931, Section 4258.

³⁷ 64 Iowa 367, 20 N. W. 475 (1884).

which forbids legislation by the general assembly respecting the establishment of religion or prohibiting the free exercise thereof: "nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister."³⁸

The court held that under the above prohibition it is optional with the individual school teacher whether or not the Bible shall be used in the school, such option being restricted only by the provision that "no pupil shall be required to read it contrary to the wishes of his parent or guardian." The court pointed out that it felt that the object of the provision is not to prevent the casual use of a public building as a place for offering prayer or doing other acts of religious worship but to prevent the enactment of a law compelling any person to pay taxes for building or repairing any place designed to be used distinctively as a place of worship.

No data are available respecting the number of schools having Bible reading.

KANSAS

The Kansas statute provides that "no sectarian doctrine shall be taught or inculcated in any of the public schools of the city; but the Holy Scriptures, without note or comment, may be used therein."³⁹

A case brought to court involved a public school teacher who had, for the purpose of quieting the pupils and preparing them for their regular studies, repeated the Lord's Prayer and the Twenty-third Psalm without comment or remark, as a morning exercise. Pupils were not required to attend. This practice was not considered a violation of religious liberty as guaranteed by the Bill of Rights⁴⁰ nor of Article 6, Section 8, of the constitution, which provides that "no religious sect or sects shall ever control any part of the common school or university of the state" nor of the statute quoted above. The court held that the teacher was not conducting a form of religious worship or teaching sectarian or religious doctrine.⁴¹

Between 40 and 50 per cent of the schools have Bible reading.

³⁸ Constitution of Iowa, Article 1, Section 3.

³⁹ Revised Statutes of Kansas, 1923, Chapter 72, Section 1819.

⁴⁰ Constitution of Kansas, Bill of Rights, Section 7.

⁴¹ *Billard v. Board of Education of Topeka*, 69 Kans. 53 (1904).

KENTUCKY

The constitution and statutes of Kentucky contain the following provisions:

No preference shall ever be given by law to any religious sect, society, or denomination . . . nor shall any man be compelled to send his children to any school to which he may be conscientiously opposed . . .⁴³

No formula or religious belief shall be taught or inculcated, nor shall any class or text-book be used which reflects on any religious denomination.⁴⁴

No books or other publications of a sectarian, infidel, or immoral character shall be used or distributed in any common school, nor shall any sectarian, infidel, or immoral doctrine be taught therein.⁴⁵

The teacher in charge shall read or cause to be read a portion of the Bible daily, in every classroom or session room of the common schools of the state of Kentucky, in the presence of pupils therein assembled, and no child shall be required to read the Bible against the wish of his parent or guardian.⁴⁶

Failure upon the part of the teacher to comply with the above statute subjects such a teacher to the revocation of his certificate.

Thomas Hackett, a Roman Catholic school patron, complained of the religious services held during school hours, which consisted of prayers, denominational hymn singing, and reading of the King James version.⁴⁶

While the court conceded that any prayer is worship and that public prayer is public worship, it contended that the appellant's rights of religious liberty were not infringed upon, since his children were not compelled to attend during the period of devotion the place where the worshipping was done; nor did the court concede that the school was a "place of worship" and its teachers "ministers of religion" within the meaning of the constitution.

According to the State Department of Education, the Bible is read in a "large number" of the schools.

LOUISIANA

According to the constitution of Louisiana,

Every person has the natural right to worship God according to the dictates of his own conscience, and no law shall be passed respecting an establishment of religion.⁴⁷

No money shall ever be taken from the public treasury, directly or indirectly,

⁴³ Constitution of Kentucky, Bill of Rights, Section 5.

⁴⁴ Kentucky Statutes (Carroll's), 1930, Section 2978a-33.

⁴⁵ *Ibid.*, Section 4368.

⁴⁶ *Ibid.*, Section 436h-1.

⁴⁷ Hackett v. Brooksville Graded School District, 120 Ky. 608; 87 S.W. 792 (1905).

⁴⁸ Constitution of Louisiana, Article 4.

in aid of any church, sect, or denominaion, or in aid of any priest, preacher, minister, or teacher thereof, as such, and no preference shall ever be given to nor any discriminations made against any church, sect, or creed of religion, or any form of religious faith or worship . . .⁴⁸

In the case of *Herold v. Parish Board of School Directors*,⁴⁹ two Jews and a Catholic, school patrons, brought complaint against the board of directors, who had passed the following resolution:

Resolved that the principals and teachers be requested to open daily sessions of the public schools of Caddo parish with readings from the Bible without note or comment, and, when the leader is willing to do so, the Lord's Prayer shall be offered.

The court, by unanimous vote, held that the reading of the King James version of the Bible, whether the Old or the New Testament, was not a discrimination against the Catholics on the part of the Protestants, but it would constitute an invasion of the rights of conscience of the Jews; hence the court enjoined the enforcement of the resolution.

The court here took the position that it did not concern itself with the differences or alleged errors in the different translations of the Christian Bible—the Douay and the King James versions—but that it did recognize the difference between the rabbinical Bible and the Christian Bible. One includes the New Testament Scriptures; the other does not. The Jew denies that the New Testament is the word of God and he denies Jesus Christ. Though he does not deny most of the teachings of Christ, he does deny His divinity and His resurrection. Therefore the court held the resolution to be a violation of the constitutional provision giving to the individual "the natural right to worship God according to the dictates of his conscience,"⁵⁰ for it favored the children of Christian parents and discriminated against children of Jews.

The Bible is not read in any of the schools.

MAINE

To insure greater security in the faith of our fathers . . . there shall be in all the public schools of the state, daily or at suitable intervals, reading from the Scriptures with special emphasis upon the Ten Commandments, the Songs of David, the Proverbs of Solomon, the Sermon on the Mount, and the Lord's Prayer. The constitution of Maine provides further that there shall be no denomi-

⁴⁸ *Ibid.*, Article 53.

⁴⁹ *Herold v. Parish Board of School Directors*, 136 La. 1034; 68 So. 116 (1915).

⁵⁰ Constitution of Louisiana, Article 4.

nation or sectarian comment or teaching and each student shall give respectful attention but shall be free in his own form of worship.⁵¹

In the town of Ellsworth suit was brought by Donahoe against one Richards, the superintendent of the school committee, for expelling his daughter from school for refusing to comply with the orders of her instructor to read the Protestant version of the Bible, such reading being a part of the general course of instruction.⁵² The court held that the regulation adopting the King James version of the Bible as a textbook was constitutional and did not infringe upon the rights of conscience or on the right of freedom of worship, but that it was binding on all the members of the schools though they held different religious faiths. The constitutionality of such Bible reading was really determined on the ground that it was claimed to be used as a textbook for reading. The court virtually left the power of book selection in the hands of the committee when it said:

The power of selection is general and unlimited. It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the state.⁵³

About 80 per cent of the schools have Bible reading.

MARYLAND

Maryland has a statute which specifies that "school books shall contain nothing of a sectarian or partisan character."⁵⁴ No case on the reading of the Bible in the public schools has come into the courts of that state.

Figures on the number of schools having Bible reading are not available.

MASSACHUSETTS

A portion of the Bible shall be read daily in the public schools, without written note or oral comment; but a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it shall not be required to read from any particular version or to take any personal part in the reading. The school committee shall not purchase or use in the public schools books favoring tenets of any particular religious sect.⁵⁵

⁵¹ Revised Statutes of the State of Maine, 1930, Chapter 19, Section 125.

⁵² *Donahoe v. Richards*, 38 Me. 376 (1854).

⁵³ *Ibid.*

⁵⁴ Annotated Code of Maryland, 1924, Article 77, Section 129.

⁵⁵ General Laws of the Commonwealth of Massachusetts, 1921, Chapter 71, Section 31.

The superintending school committee of the town of Woburn passed an order that the schools of the town should be opened each morning with reading from the Bible and prayer, and that during the prayer the scholars should bow their heads. Any scholar whose parents so requested should be excused from bowing the head. The father of one of the pupils declined to request such exception for his daughter. She persisted in her refusal to bow her head during prayer and was accordingly dismissed from school until she should comply or until her parents should request that she be excused from such participation. Action was brought to recover damages.⁵⁶

The court held that the committee of the town might lawfully pass the order here complained of. The court did state, however, that it would not be competent for a school committee to pass an order or regulation requiring pupils to conform to any religious rite or observance or to participate in any religious forms or ceremonies. That would be violative of the spirit and of the religious liberty clause of the constitution, which provides that no one should be hurt or molested in his personal liberties or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience. The court further held that it would be inconsistent with the plain intention of the legislature in providing that no one shall be excluded from a public school on account of religious opinions, but that in this case the act prescribed by the committee was not necessarily one of devotion or religious ceremony. It went no further than to require the observance of quiet and decorum during the religious service with which the school was opened. It did not compel a pupil to join in prayer, but only to assume an attitude calculated to prevent interruption, and he might be excused from complying with the prescribed position if the parent requested the child to be excused.

The Bible is read in all the schools of the state.

MICHIGAN

Every person shall be at liberty to worship God according to the dictates of his own conscience . . . No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society. . . . The civil and political rights,

⁵⁶ *Spiller v. Inhabitants of Woburn*, 94 Mass. 127 (1866).

privileges, and capacities of no person shall be diminished or enlarged on account of his religious beliefs.⁵⁷

The board shall not apply any moneys received by it from any source for the support or maintenance of any school of a sectarian character, whether the same be under the control of any religious society or made sectarian by the school board.⁵⁸

Pfeiffer, a school patron and taxpayer, sought a mandamus to compel the Board of Education of the city of Detroit to discontinue the use in the public schools of a book known as *Readings from the Bible*. This book was composed almost entirely of extracts from the Bible emphasizing the moral precepts of the Ten Commandments. No comments were made by the teacher, who was required to excuse from that part of the session any pupil whose parent or guardian should request it.⁵⁹

In the majority opinion the court took the position that it does no violence to the conscientious scruples of a person to listen to readings from the Bible if he has the option of being excused from listening to them. It held that the Ordinance of 1787 does not make it obligatory that religion be taught in the public schools, but that, on the other hand, it was not the intention of the framers of the constitution, "in the absence of a clear expression to that effect, to exclude wholly from the schools all reference to the Bible." The dissenting opinion asserted Bible reading in the public schools to be in direct conflict with the constitution.

The Bible is read in very few of the schools.

MINNESOTA

The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship . . . against his consent . . .⁶⁰

[No appropriation for sectarian schools may be made, nor may] any public moneys or property be appropriated or used for the support of schools wherein the distinctive doctrines, creed, or tenets of any particular Christian or other religious sect are promulgated or taught.⁶¹

"The teachers in all public schools shall give instruction in morals, in hygiene, and in the effects of narcotics and stimulants."⁶²

The school board of the city of Virginia was requested by the local ministerial association to place a copy of the Bible in every

⁵⁷ Constitution of Michigan, Article 2, Section 3.

⁵⁸ Compiled Laws of Michigan, 1929, Chapter 131, Section 7156 (f).

⁵⁹ Pfeiffer v. Board of Education of Detroit, 118 Mich. 560 (1898).

⁶⁰ Constitution of Minnesota, Article 1, Section 16.

⁶¹ *Ibid.*, Article 8, Section 3.

⁶² Minnesota General Statutes, 1923, Section 2906.

schoolroom and to direct the superintendent to make suitable selections to be read without comment by each teacher at the opening of school. In the request it was asserted that our nation was founded upon Christian principles, that the nation could prosper only as guided by the teaching of the Bible, and that the youth will receive moral and spiritual help therefrom. The school board concurred in the request and placed the King James version in every schoolroom. The superintendent made suitable selections from the Old Testament only. Upon the objection of parent or pupil the pupil might retire from the room during such reading. Action was brought to enjoin the reading of these selections.⁶³ The court held by a divided vote that the constitutional provisions contained in Article 1, Section 16, and Article 8, Section 3, were not infringed upon by the action and that the purpose of the school board in having the Bible read was to implant in the minds of the pupils higher moral and ethical standards and a knowledge of the Bible and not to teach the doctrines of any religious sect.

Chief Justice Wilson wrote a strong dissenting opinion.

The Bible is read in very few of the schools.

MISSISSIPPI

The state of Mississippi, though having no law requiring the reading of the Bible in the public schools, does have a statute that requires "a suitable course of instruction in the principles of morality and good manners, prepared by the State Board of Education,"⁶⁴ to be used in all the public schools of the state. Such courses must include "what is known as the Mosaic Ten Commandments" and may be arranged so that a certain amount of time will be devoted to such study in each grade.

No doctrinal or sectarian teaching may be permitted in the public schools, and no pupil may be required to take the course if his parent or guardian requests the superintendent or teacher in writing that he be excused from doing so. The county and city superintendents of schools are to see that the provisions of the law are carried out.⁶⁵

The Bible is read in most of the schools.

⁶³ *Kaplan v. Independent School District of Virginia*, 214 N. W. 18; 171 Minn. 142 (1927).

⁶⁴ Mississippi Code, 1930, Section 6843.

⁶⁵ *Ibid.*

MISSOURI

Missouri has no statute bearing directly on the subject of Bible reading in the public schools, nor have any cases been brought to the court.

Only a very small number of the schools have Bible reading.

MONTANA

Montana has a statute reading, "No publication of a sectarian, partisan, or denominational character shall be used or distributed in any school, or be made a part of any school library; nor shall any sectarian or denominational doctrine be taught therein."⁶⁶ She has no statute bearing directly on the subject of Bible reading in the public schools; nor have any cases pertaining to Bible reading in the public schools come to her courts.

The State Department of Education estimates that the Bible is read in fewer than 10 per cent of the schools.

NEBRASKA

All persons have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent . . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.⁶⁷

No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes . . . No religious test or qualification shall be required of teacher or student for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.⁶⁸

Miss Edith Beecher, a teacher in the public schools of Beatrice, in Gage County, obtained permission from the school board to have religious exercises in her school during school hours. These exercises consisted of readings from the Bible, the singing of hymns, and the offering of prayer in accordance with the doctrines and beliefs of sectarian churches. An order was sought to prevent the reading of the Bible and the singing of the religious songs.⁶⁹

⁶⁶ Revised Codes of Montana, 1921, Section 1055.

⁶⁷ Constitution of Nebraska, Article 1, Section 4.

⁶⁸ Constitution of Nebraska (amended, 1920), Article 7, Section 11.

⁶⁹ State v. Scheve, 65 Nebr. 853; N. W. 846 (1902).

The court held that the exercises as conducted by the teacher constituted compulsory attendance at worship and sectarian instruction contrary to Article 1, Section 4, and Article 7, Section 11, of the constitution. No decision was ordered as to whether or not the reading of the Bible without comment would be permissible. The complaint entered in this case was not simply against the reading of the King James version of the Bible but also against the offering of prayers and the singing of religious songs.

No data are available on the number of schools having Bible reading.

NEVADA

Neither in the constitution nor in the statutes of Nevada are there any specific provisions relating to the reading of the Bible in public schools. There are, however, in both the constitution and statutes very strong statements prohibiting sectarian instruction, books, tracts, or papers in the public schools.⁷⁰

The Bible is read in none of the schools.

NEW HAMPSHIRE

The statutes of New Hampshire contain the following statement:

No book shall be introduced into the public schools calculated to favor any particular religious sect or political party.⁷¹

Bible reading, which is deemed optional, is common in the school system. There are no court cases on the subject.

NEW JERSEY

No religious services or exercises, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools.⁷²

In each public school classroom in the state, and in the presence of the scholars therein assembled, at least five verses from that portion of the Holy Bible known as the Old Testament shall be read . . . without comment, at the opening of such school, upon each and every school day . . .⁷³

The Bible is read in all the schools.

⁷⁰ Constitution of Nevada, Article 11, Sections 2, 9, 10; Nevada Compiled Laws, 1929, Section 5754.

⁷¹ Public Laws of the State of New Hampshire (1926), Chapter 117, Section 22.

⁷² Paragraph 114, Compiled Statutes of New Jersey, 1910 (Public Laws 1903, Second Special Session), Vol. 4.

⁷³ Cumulative Supplement to Compiled Statutes (1924), Vol. II, Section 185, Paragraph 479 (L. 1916, c. 263, p. 553).

NEW MEXICO

No religious test shall ever be required as a condition of admission into the public schools or any educational institution of this state, either as a teacher or student, and no teacher or student of such school or institution shall ever be required to attend or participate in any religious service whatsoever.⁷⁴

No teacher shall use any sectarian or denominational books in the schools, or teach sectarian doctrines in the schools, and any teacher violating the provision of this section shall be immediately discharged . . .⁷⁵

Bible reading is considered to be prohibited in the public schools.

NEW YORK

In New York the superintendent of schools by special act of the legislature in 1822 was given power to decide all controversies regarding admissions to the common schools. Superintendents, in their turn, passed upon cases involving religion and sectarian influences in the public schools.

In New York the court has heard cases concerning the wearing of religious garb by teachers in the public schools,⁷⁶ the excusing of children from the regular school session to attend churches or church schools for religious instruction,⁷⁷ and the temporary use of a church chapel as a public school,⁷⁸ but none pertaining to Bible reading in the public schools of this state. Generally speaking, Bible reading is not permitted. This practice is in harmony with opinions rendered by the attorney-general of that state.

NORTH CAROLINA

The state of North Carolina has no laws on the subject of Bible reading in the public schools, nor have there been any court cases on the subject.

By statute the school committee of a school district where there is no public school may, with the approval of the county superintendent, contract with the teacher of a private school (which must not be sectarian or denominational) to give instructions to

⁷⁴ Constitution of New Mexico, Article 12, Section 9.

⁷⁵ New Mexico Statutes Annotated, 1929, Chapter 120, Section 1102.

⁷⁶ O'Connor v. Hendrick, 184 N. Y. 421 (1906).

⁷⁷ Stein v. Brown, 211 N. Y. S. 822; 125 Misc. Rep. 692 (1925); *People ex rel. Lewis v. Graves*, 245 N. Y. 195 (1927).

⁷⁸ In the Matter of Roche, 26 N. Y. St. Dept. Rep. 217 (1921).

all pupils of the district in the branches of learning taught in the public schools.⁷⁹

The Bible is read in a large number of the schools.

NORTH DAKOTA

A North Dakota statute which stipulates that the Bible shall not be "deemed a sectarian book," and that it shall not be excluded from any public school, leaves it to the option of the teacher to read from it if she wishes, but specifies that the reading must be without sectarian comment and must not exceed ten minutes a day. Pupils may not be required to be present during the reading contrary to the wishes of parents or guardians.⁸⁰

Moral instruction is required.⁸¹

In 1927 a law was passed making it the duty of the school board or board of education of every state institution of higher education that is supported by public taxes to display a placard containing the "Ten Commandments of the Christian religion in a conspicuous place" in every classroom.⁸² The Department of Public Instruction has the authority to have such placards printed and may charge to the state the printing and distribution of them.⁸³

The Bible is read in very few of the schools.

OHIO

Certain taxpayers of the city of Cincinnati brought action against the Board of Education to enjoin them from carrying into effect two resolutions.⁸⁴ One prohibited religious instruction and the reading of religious books, including the Bible, in the common schools of Cincinnati. The other repealed a former regulation requiring that the opening exercises in every department should start with reading of the Bible by or under the direction of the teacher and with appropriate singing by the pupils.

It had been the practice in the Cincinnati schools since 1829 to read, during the opening exercises, portions of the King James version without comment. No sectarian teaching or interference

⁷⁹ North Carolina Code of Laws, 1931, Section 5537.

⁸⁰ Compiled Laws of North Dakota, 1913, Section 1388.

⁸¹ *Ibid.*, 1890, Section 1389.

⁸² Laws of North Dakota, 1927, Chapter 247, Section 1.

⁸³ *Ibid.*, Section 2.

⁸⁴ Board of Education of Cincinnati v. Minor et al., 23 Ohio St. 211 (1872).

with the rights of conscience had at any time been permitted. The resolutions of the Board of Education now forbid the reading of the Bible and other books of a religious nature. The action was an effort to prevent the resolutions from being put into effect.

The defense admitted the importance of a knowledge of the Bible but denied that such instruction ought to be imparted in the schools established by the state. By unanimous decision the Supreme Court of Ohio said that it did not have the right to interfere in the management or control of the schools and that the board's right to pass and enforce the resolutions was sustained.

In this case the court said that reading the Bible and singing constituted a "form of worship," that religious instruction and the reading of religious books, including the Bible, cannot be prosecuted in schools supported by the taxation of men of all religious opinions without violating the constitution of Ohio, and that "neither Christianity nor any other system of religion is a part of the law of this state."⁸⁵ It left the question of Bible reading to the discretion of the school officials.

It is estimated that 85 per cent of the schools have Bible reading.

OKLAHOMA

The Oklahoma statute which became effective January 6, 1918, provides that no religious nor sectarian doctrine shall be taught in any of the public schools of the state, but that this prohibition shall not "be construed to prohibit the reading of the Holy Scriptures."⁸⁶

No data are available on the number of schools having Bible reading.

OREGON

Oregon has no statute or court case specifically dealing with the reading of the Bible in the public schools, though pupils may be excused to attend week-day schools giving instruction in religion.⁸⁷ A statute prohibits teachers in the public schools from wearing the garb of a religious order.⁸⁸

The Bible is read in very few of the schools.

⁸⁵ Constitution of Ohio, Article 1, Section 7; Article 7, Section 2.

⁸⁶ Compiled Oklahoma Statutes Annotated, 1921, Section 10618.

⁸⁷ Oregon Code, 1930, Section 35-3501 (Law of 1925).

⁸⁸ *Ibid.*, Section 35-2406 (Act of 1923).

PENNSYLVANIA

At least ten verses from the Holy Bible shall be read or caused to be read without comment, at the opening of each and every public school, upon each and every school day by the teacher in charge . . .⁸⁰

The teacher who fails to comply with this statute is subject to dismissal.⁸⁰

The Bible is read in most of the schools.

RHODE ISLAND

Rhode Island has no laws or cases on the reading of the Bible in the public schools, and the practice is carried on in almost none of the schools.

SOUTH CAROLINA

South Carolina has no statute on the reading of the Bible in the public schools, though a law does state:

He [the state superintendent] shall secure, by and with the advice of the State Board of Education, uniformity in the use of textbooks throughout the free public schools of the state, and shall forbid the use of sectarian or partisan books and instruction in said schools . . .⁸¹

The Bible is widely read in the schools.

SOUTH DAKOTA

In 1907 South Dakota passed a law stating:

No sectarian doctrine may be taught or inculcated in any of the public schools of the state but the Bible without sectarian comment may be read therein.⁸²

In February, 1925, the school board of District No. 8 of Meade County ordered that the Bible be read or the Lord's Prayer be repeated without sectarian comment in all the public schools. Pursuant to this order, passages from the King James version were read or the Lord's Prayer was repeated as an opening exercise, but no sectarian comment was made. Some twelve or fifteen Catholic children refused to attend the opening exercises, whereupon they were expelled and forbidden to return unless they signed a written apology. The Supreme Court of South Dakota issued a mandamus to compel the school board to readmit the children without apology, and thereafter to permit them to ab-

⁸⁰ Purdon's Pennsylvania Statutes Annotated, 1931, Title 24, Section 1555.

⁸¹ *Ibid.*, Title 24, Section 1556.

⁸² Civil Code of South Carolina, 1922, Vol. 3, Paragraph 2533.

⁸³ Compiled Laws of South Dakota, 1929 (Law of 1907), Section 7659.

sent themselves during the reading of the King James version of the Bible.⁹³

In this case not only was the King James version of the Bible read in a public school, which brought offense to Catholic pupils and their parents, but the Catholic children were compelled to attend such reading under penalty of expulsion. The relator contented himself with the reinstatement of his son in school with the liberty of absenting himself during the prescribed reading of the Bible.

According to the State Board of Education, the Bible is read in about 10 per cent of the schools.

TENNESSEE

Tennessee requires the teacher to read or have read at the opening of school every day "a selection from the Bible and the same selection shall not be read more than twice a month."⁹⁴

Failure to have such Bible reading makes the teacher subject to dismissal.⁹⁵ Pupils may be excused from such reading upon written request of the parents.⁹⁶

It is estimated by the State Board of Education that the Bible is read in 75 per cent of the schools.

TEXAS

In Texas, which has no statute on the subject of Bible reading, the board of school trustees of the school district of Corsicana adopted a resolution that, while they did not require religious morning exercises in the school, they did "view with favor" such opening exercises. This brought to the courts an action by Church,⁹⁷ an unbeliever, two Catholics, and two Jews against Bullock and members of the board of school directors of the city of Corsicana to prevent the holding in the public schools of morning exercises consisting of the reading of the Bible, the repeating of the Lord's Prayer, and the singing of appropriate songs. The reading of the Bible was without comment, and the King James version was used. Students were requested to take part, and also

⁹³ State ex rel. Finger v. Weedman, et al., School District Board, 226 N. W. 348, Supreme Court of South Dakota, June 27, 1929.

⁹⁴ Code of Tennessee, 1932 (Law of 1925), Section 2343.

⁹⁵ Session Laws, 1915, Public Acts, Chapter 102, Section 2.

⁹⁶ *Ibid.*, Chapter 102, Section 5.

⁹⁷ Church v. Bullock, 109 S. W. 115 (1908).

to stand and bow their heads when the Lord's Prayer was offered, though they were not required to participate in the prayer. For the most part, the songs were patriotic songs. The only requirement made by the teacher was that the pupils be present during the exercises and behave in an orderly manner.

The court, while it held that such exercises did not violate the religious liberty clause of the constitution nor constitute the appropriation of public funds for sectarian purposes, the right to instruct the young in the morality of the Bible might be carried to such an extent in the public schools as to make it "obnoxious to the constitutional inhibition, not because God is worshiped but because by the character of the services the place becomes 'a place of worship.'"

The Bible is read in only a small number of schools.

UTAH

Utah, although having no laws on the subject of Bible reading, has a statute prohibiting the teaching of "any atheistic, infidel, sectarian, religious, or denominational doctrine" in the public schools.⁹⁸ No cases, however, have come to her courts.

The Bible is read in none of the schools.

VERMONT

Vermont has no statutes or cases bearing on Bible reading. Very few of the schools have Bible reading.

VIRGINIA

Virginia has no statutes or cases bearing on the subject of Bible reading.

The Bible is read in most of the schools.

WASHINGTON

Since Washington has no statute mentioning the Bible or Bible reading in the public schools, the attorney-generals of the state have ruled on the subject.

In Opinions of the Attorney-General, 1909-10, p. 135, and 1915-16, p. 254, it is stated in answer to the question whether or not a teacher has the legal right to open school and whether the directors of a school district may prescribe a course of Bible study

⁹⁸ Utah Laws, 1921, Chapter 95, Section 1.

to apply toward graduation from high schools provided that no part of the public school money, time, or property is used in conducting such courses: "The legal objection to the proposed system of Bible study is that the courses of study are made a part of the public school curriculum."

Opinions of the Attorney-General, 1891-92, p. 142, reads: "The stated reading of the Bible in the public schools of this state is a religious exercise within the meaning of the constitution and as such is prohibited by Section 11, Article 1, of that document."

Albert Dearle, a pupil, brought action against Frazier,⁹⁹ superintendent of schools, for refusing to give him an examination in Bible studied outside of school and credit toward high school graduation. The State Board of Education had, in 1915, passed the following resolution:

Since the board looks with favor upon allowing credits for Bible study done outside of school, it is moved that a committee be appointed to consider a plan for allowing such credits, one-half credit to be given for Old Testament, and one-half credit for New Testament, on the basis of thirty to thirty-two credits for high school graduation, and that a syllabus of Bible study be issued under the auspices of the State Department of Education with rules and regulations for the distribution of examination questions at least once a year.

It was in connection with this plan that a number of schools made provision for outside Bible study. The school was to furnish the syllabus, give the examination, grade the papers, and determine how much credit should be given.

By unanimous decision the court held that the action sought constituted an expenditure of public funds for "religious worship, exercise, and instruction, or the support of any religious establishment," prohibited by the constitution.

The court pointed out that the growth of public sentiment against a combination of church and state did not "indicate a decrease in religious sentiment among the people," that "these provisions have not been the work of the enemies, but of the friends of religion," that the words "No public money shall be appropriated or applied to any religious worship, exercise, or instruction" are "sweeping and comprehensive," and that such a statement is "plain, simple, and mandatory, and by it the legislature, school authorities, and courts are bound."

The Bible is read in none of the schools.

⁹⁹ State ex rel. Dearle v. Frazier, 102 Wash. 369 (1918).

WEST VIRGINIA

West Virginia has no statutes or court decisions bearing on the subject of Bible reading in the public schools, though her constitution emphasizes that the state school funds shall be "applied to the support of free schools throughout the state, and to no other purpose whatever."¹⁰⁰

Twenty-five per cent of the schools report that they have Bible reading.

WISCONSIN

Though Wisconsin has no statute bearing directly on the subject of Bible reading in the public schools, Weiss and others, Catholic school patrons, asked the court for a writ of mandamus to prevent the reading of the Bible in School District No. 8 in the city of Edgerton.¹⁰¹ The King James version of the Bible appeared on the list as a textbook. Portions were selected and read by the teacher, no comments were made on the reading, and the children were not required to attend the reading.

The court held by unanimous decision that the reading of the Bible, even though unaccompanied by any comment, has a tendency to inculcate sectarian ideas within the meaning of the Wisconsin law which provides that "no textbook shall be permitted in any free public school which will have a tendency to inculcate sectarian ideas,"¹⁰² and that such reading constituted sectarian instruction within the meaning of the constitution,¹⁰³ and that it was an interference with the rights of conscience of the students as well as constituting the appropriation of public moneys for the benefit of a religious school.¹⁰⁴

In this connection the court held that textbooks should not be banished from the district schools because they are founded upon the fundamental teachings of the Bible, or because they contain certain extracts therefrom. Such teaching and extracts "pervade and ornament our secular literature, and are important elements in its value and usefulness," said the court. "Such textbooks are in the schools for secular instruction, and rightly so; and the con-

¹⁰⁰ Constitution of West Virginia, Article 12, Section 4.

¹⁰¹ Weiss v. District Board, 76 Wis. 177; 44 N. W. 967 (1890).

¹⁰² Laws of 1883, Chapter 251, Section 3.

¹⁰³ Constitution of Wisconsin, Article 10, Section 3.

¹⁰⁴ *Ibid.*, Article 1, Section 18.

stitution prohibition of sectarian instruction does not include them . . .”

The court took the view that even though pupils were excused from such Bible reading, the practice “tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.”

“The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and, above all, by parents in the home circle . . .”

“This case is important and timely,” said the court. “It brings before the courts a case of the plausible, insidious, and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the constitution. Those provisions should be pondered and heeded by all of our people, of all nationalities, and of all denominations of religion, who desire the perpetuity, and value the blessings, of our free government.”

None of the schools report Bible reading.

WYOMING

“No sectarian instruction, qualifications, or tests shall be imposed, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.”¹⁰⁵ There are, however, no statutes or court decisions dealing specifically with the subject of Bible reading in the public schools.

Very few of the schools have Bible reading.

¹⁰⁵ Constitution of Wyoming, Article 7, Section 12.

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